NO. 75-1083

In the Supreme Court of the United States

OCTOBER TERM, 1975

M. C. MANUFACTURING CO., INC., and
UNIVERSAL AUTOMATIC MACHINE CO., INC.,
Petitioners,

VS.

TEXAS FOUNDRIES, INC., and H/R PRODUCTS, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, M. C. Manufacturing Co., Inc., and Universal Automatic Machine Co., Inc., (hereinafter collectively referred to as "Universal") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 21, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 517 F. 2d 1059. No opinion was rendered by the district court.

JURISDICTION

The judgment of the Court of Appeals was entered on August 21, 1975. A timely motion for rehearing was denied on November 12, 1975, and this petition is filed within ninety days of that date. This court's jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

Two questions are presented by this petition. One involves the Sherman Act, and the other involves the Robinson-Patman Act.

The Sherman Act Question

The Court of Appeals held that petitioners-plaintiffs, Universal, had failed to prove "fact" of injury resulting from a Sherman Act Section 1 violation. The proof showed that as a result of a forbidden conspiracy, Universal's chief supplier, respondent-defendant Texas Foundries, Inc., extended a lower price quotation to petitioners-plaintiffs' competitor, respondent-defendant H/R Products, Inc., which enabled H/R to become successful bidder for a government contract to produce type "G" lifting plugs. The Court of Appeals concluded (1) that the price granted H/R by Texas Foundries could not be utilized by Universal in proving "fact" of injury, i.e., in establishing that Universal could have secured the award, and (2) the evidence revealed that a third company, i.e., Land-Air, Inc., was second low bidder and would have secured the award in the absence of the conspiratorially low price. The first question, therefore, consists of two parts:

1. Did the Court of Appeals for the Fifth Circuit correctly conclude that Universal failed to establish "fact" of injury where,
   (a) the evidence shows that by utilization of the same price extended by Texas Foundries to H/R, Universal would have been the low bidder? and,
   (b) the evidence reveals facts upon which the jury could justifiably conclude that the second low bidder, Land-Air, Inc., was not eligible for and would not have received the award even in the absence of the H/R bid?

Robinson-Patman Act Question

With respect to the Robinson-Patman Act claim, the proof shows that on November 12, 1971, Universal entered a purchase-order contract with Texas Foundries for rough-cast plugs at a price of 32.5-cents each, F.O.B. Texas Foundries Plant (Lufkin, Texas). On November 18, 1971, Texas Foundries quoted 32.5-cents per casting price F.O.B. Texas Foundries plant, in response to Universal's request for quotation upon which to base a bid for Government Contract No. DAAA-09-72-0208. Texas Foundries represented that this was the lowest price it could or would extend, but on November 29, 1971 (according to the finding of the jury) Texas Foundries quoted a price of 31¢ per casting F.O.B. South Bend, Indiana (H/R's place of business) to H/R. As a result of these discriminatory quotations, Universal did not receive the award of Government Contract DAAA-09-72-C-0208, and therefore,, obviously, did not purchase rough castings from Texas Foundries with which to fulfill such contract. However, Universal (pursuant to the November 12, 1971 purchase order) and H/R (pursuant to its November 29, 1971 agreement) both purchased the same item (the rough cast plugs) from Texas Foundries, at different prices and upon different freight terms, during the same period of time. Despite this, the lower court held that Universal failed to prove that the discriminatory purchases were 'in competition" and therefore no violation of Robinson-Patman was demonstrated. Accordingly, the Robinson-Patman Act question is:

2. Is a Robinson-Patman Act violation established, <u>prima facie</u>, when the proof shows that

competiting bidders for the same Government awards are being sold the same item, at discriminatory prices, during the same period of time, albeit for two different contract awards, where one of the bidders is prevented from securing one of the contract awards because of the discrimatory pricing?

STATUTES INVOLVED

The statutory provisions involved are Section 1 of the Sherman Act (Title 15 U.S.C. Sec. 1), Section 2(a) and (f) of the Robinson-Patman Amendment to the Clayton Act, (Title 15 U.S.C. Sec. 14 (a) and (f)) and Section 4 of the Clayton Act (Title 15 U.S.C. Sec. 15) which provide, in pertinent part:

Sherman Act Section 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is hereby declared to be illegal".

Robinson-Patman Act Section 2(a):

"It shall be unlawful for any person engaged in commerce in the course of such commerce, either directly or indirectly, to discriminate in price between purchasers, . . .".

Clayton Act Section 4:

"That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States, . . ."

STATEMENT OF THE CASE

The facts of the case are summarized, in general fashion, in the initial portion of the opinion of the Fifth Circuit Court of Appeals. Additional facts are noted in the sections of the opinion relating to the "Sherman Act Claim" and the "Robinson-Patman Claim". Those facts are accurate, except to the extent specifically challenged in this application. (An "in-depth" analysis of the facts is contained in Appellee's Brief filed in the Fifth Circuit Court of Appeals, to which reference may be had if necessary). With this qualification, the statement of the case by the lower court is adopted.

REASONS FOR GRANTING THE WRIT

- Sherman Act Questio.

The opinion of the Fifth Circuit Court of Appeals recognizes that the jury was justified in finding a violation of Section 1 of the Sherman Act. The opinion states:

"If plaintiffs' theory of the case and version of the evidence were accepted by the jury, as they may have been, then a Sherman Act violation has been established."

However, the opinion holds that the "fact" of injury has not been established because ". . .plaintiffs failed to establish that in the absence of the defendant's discriminatory pricing scheme Universal would have received this contract".

The Court of Appeals correctly notes that the bid of Universal on contract DAAA-09-72-C-0208 was the third low bid submitted, the first being that of the defendant H/R and the second being that of Land-Air, Inc. Universal demonstrated, using the same profit and cost factors employed in submitting its bid, that had it received the same price as was extended to H/R it would have been the successful bidder, i.e., its bid would

have been substantially lower than that of H/R.[1] This would have made Universal the low bidder, since the record shows that the only other company to obtain a price quotation from Texas Foundries for this contract was Deco-Grand, whose bid was not in contention (and who, therefore, would not benefit from the same bid revision).

The Fifth Circuit Court holds that this "conspiratorially low" price extended to H/R must be disregarded in determining the "fact" of injury, i.e., whether Universal would have been the successful bidder. This is a novel proposition, without precedent. It is contrary to concepts engrained in antitrust laws. Comparable assumptions have long been sanctioned in proof of the extent of damages. For example, *Wall Products Co. v. National Gypsum Co.*,357 F. Supp. 832, allowed plaintiffs to recover the difference in the price actually paid for wallboard, and the price which it was assumed Plaintiffs would have been paid absent the conspiracy. *Cherokee Laboratories v. Rotary Drilling Services,* 383 F. 2d 97 (5th Cir. 1967) cert. den. 390 U.S. 904 sanctioned the assumption by plaintiff of defendant's sales figures in making a damage projection (of lost profits). *Lehrman v. Gulf,* 464 F. 2d 26 (5th Cir. 1974) cert. den., 409 U.S. 1077, and *Terrell v. Household Goods Carriers Bureau,* 494 F. 2d 16 (5th Cir. 1974) upheld assumptions of projected sales figures based on opinion (expert and non-expert) evidence, and *Hobart Brothers Co. vs. Malcolm T. Gilliland, Inc.,* 471 F. 2d 894 (5th Cir. 1973) cert. den. 412 U.S. 923, holds that damage proof can be based on assumptions if the assumptions rest on an evidentiary base. Obviously, therefore, Universal could assume the lower sales price for the purpose of proving extent of damages. What logic is there, therefore, in denying its use to prove fact of damages?

Reasoning further, it is obvious that the "conspiratorially

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1. Mr. Merle Childress testified that had the lower price extended H/R been granted to Universal, Universal's bid would have been submitted on this basis, i.e., with profit and other cost factors the same.

low" price is a fact that is an integral part of the proof of the conspiracy and an overt action pursuant to the conspiracy. Why then, must it be ignored when determining "fact" of damage? The illogic of the proposition is compound.

Furthermore, the role of the Land-Air bid was not properly examined by the lower court, which held: "It is crystal clear that Land-Air was a viable bidder and that, even after disregarding H/R's low bid because of the special conspiratorially low price it received from Texas Foundries, Land-Air's bid stood between Universal and the opportunity to acquire this contract." The evidence is to the contrary for, even accepting the Court of Appeals' position that the "conspiratorially low" price must be ignored in ascertaining "fact" of damage, the jury was justified in finding that Universal would have received the award, and that Land-Air was not eligible for and would not have received it. Though it is adequately shown by the record, an affidavit obtained from a Land-Air executive and submitted to the Court of Appeals in connection with the petitioners-plaintiffs' motion for rehearing lays to rest any question on the point.

These propositions will be discussed separately, with the latter proposition being discussed first.

1. Land-Air was not a viable bidder and did not stand between Universal and the opportunity to acquire the contract.

Bids on the contract in question were opened on December 3, 1971. App. 456. The contract award was signed on December 30, 1971. P. Ex. 46, App. 1397, et. seq. The pre-award surveys were held, as they are customarily held, within the period from the date of the bid opening to the date of the contract award. App. 211. The purpose of the pre-award survey is succinctly stated in the testimony of Mr. Childress (App. 207):

> "Q. Now, what does the term - if you are familiar it (sic) in connection with your dealings with the government or APSA - called a 'pre-award survey'?

"A. Upon notification that your company is either low bidder or within the realm of competitive prices, among the low bidders, then the government performs what they call a pre-award survey on usually the three low bidders. That is for the purpose of establishing qualifications of each company to ascertain the fact that they can perform if the government awards them the contract, at this pre-award survey where they delve into all aspects of your business".

The record reveals that there is a misconception and a misstatement in the following quotation critical to the lower court's opinion relating to the pre-award survey and Land-Air's status as a "viable bidder":

"While it is true that Land-Air's bid was initially classified as nonresponsive and consequently Land-Air did not receive a pre-award survey, a memo from the APSA contracts specialist in charge of contract DAAA-09-72-C-0208 negotiations introduced at trial reveals that an amendment was received from Land-Air on December 1, which negated the previous non-responsive action considered, and led to reinstatement of Land-Air's bid prior to award. It is crystal clear that Land-Air was a viable bidder and that, even after disregarding H/R's low bid because of the special, conspriatorially low price it received from Texas Foundries, Land-Air's bid stood between Universal and the opportunity to acquire this contract."

Land-Air's failure to receive a pre-award survey was not a consequence of the initial classification of Land-Air's bid as non-responsive, though it is true that Land-Air's amendment caused a change in the previous classification, and was in time for the bid opening December 3, 1971. App. 1394. P. Ex. 43. The amendment was inadvertently misdirected and placed with the "no bid" responses, but this was corrected and the Bid Opening Officer and Recorder were notified of the error on December 17,

1971, and corrective action was taken. App. 1394. This was well within the pre-award survey phase, as is evidenced by the fact that the pre-award survey of Universal Automatic Machine Company, Inc., was not made until December 16, 1971. P. Ex. 45, App. 1396.

Therefore, a pre-award survey could have been made prior to the bid award had Land-Air been considered for the award. But the record conclusively demonstrates that Land-Air received no pre-award survey and was not in position to be considered for the award, and therefore was not a "viable bidder".

H/R, Universal, and AMS Manufacturing, Inc. of Amityville, N. Y., were all subjected to pre-award surveys. AMS submitted the fourth low bid. P. Ex. 43, App. 1391. *Government regulations require a pre-award survey to determine whether a bidder is "responsible"* (to be distinguished from "responsive") *and entitled to an award.* Witness the following excerpts from the testimony of Anthony Costa, Supervisor Contracts Speicalist, Procurement Division, United States Army Ammunitions Command, Joliet, Illinois: (App. 397-399)

"Q. What constitutes the evaluation phase? What specific activities and various distinct categories make up a part of the evaluation phase?

"A. The first thing that would be considered is to review the bid packages of those within the zone of consideration of an award to verify that they are all responsive.

"Q. What establishes the criteria for the zone of consideration?

"A. Well, if one award is made - - it depends on the bid process. The one award is made and maybe ten bids submitted, and the first four maybe are close.

"Then the balance on the remaining six, see, the prices are entirely out of line, then you would concentrate

on the first four on this particular example I'm giving.

"Q. Yes sir. You would select from all the bids those that appear to be more nearly competitive with each other as to price?

"A. Yes. You would include all bids in the evaluation but would concentrate on the low. You would check all the packages to see that they are all responsive to the invitation..

"Q. You probably have had occasion where bidders simply did not meet some specification in the invitation to bid and, therefore, would have to be eliminated?

"A. Yes. If a bidder is non-responsive, he can be eliminated.

"Q. Let me go on the record and ask you about this particular lift plug bid that we have identified and whether it had any restriction on it concerning the type of prime contractor that would have to be selected by you folks?

"A. Yes. This solicitation, the one you asked about - - Do you want me to repeat the number?

"Q. No, sir.

"A. It was a one hundred percent small business set-aside.

"Q. Could you tell us what that means?

"A. It was restricted to small business firms.

"Q. What is the next step, sir, in this part of the

evaluation phase?

"A. *The next step would be to request a pre-award survey on that firm or firms that you feel would have to be termed as responsible producers.*

"Q. What is a 'pre-award survey'? How would you define that for us?

"A. I think the name in itself indicates what it is. Do you want a better or different answer?

"Q. Let me ask you this: *Your rules and regulations require that a pre-award survey team be constituted to evaluate a certain number of bidders in a given contract to determine whether or not they are responsible bidders?*

"A. *Yes, sir."* (Emphasis supplied)

There is one instance in which a bidder can be determined to be "responsible" without a pre-award survey: (App. 410)

"Q. Do your regulations require a pre-award survey for any prime contractor under consideration to be awarded a bid?

"A. No.

"Q. In what instance would it not be?

"A. *Well, if we have records here to justify that that responsive bidder is responsible, we can make that decision with a Contract Officer's determination.*

"Q. *But in the instance we are talking about there was a pre-award survey on H/R and Universal and Amityville, New York.*

"A. *That's what the records show here.*" (Emphasis supplied)

This testimony in itself supports the conclusion that the jury reached, (i.e., that Universal would have received the award), since there was never a determination of any sort that Land-Air was a responsible bidder. But there is more support in the record.

First, one of the reasons for making the "responsible" determination is pertinent: (App. 419)

"Q. Do you require your potential prime contractors to advise you in this lift plug situation of their intended source of supply of raw castings?

"A. You mean prior to award?

"Q. Yes, sir.

"A. This is required in the pre-award survey.

"Q. Why is it required?

'A. Well, to assure he would be a responsible prime contractor; and to be a responsible prime contractor he has to show who he will get his supplies from."

This was never done with respect to Land-Air.

Next, the testimony elaborates on the basis for making a "responsible" determination without a pre-award survey: (App. 428-430)

"CROSS EXAMINATION BY MR. HATHAWAY:

"Q. Now, can you give me the status of those four bidders after evaluation with reference to their relative

positions?

"A. Do you want them in order, sir?

"Q. As to who they were, yes, sir. In other words H/R must have been first; they got the contract?

"A. Yes.

"Q. Can we get the price now? I want to know who numbers two, three and four were after evaluation.

"A. The evaluated bid price for H/R is .47362, and the evaluated bid price for Universal is .49107. Is that all you want?

"Q. No. I want three and four. Who is that?

"A. The second one was Land-Air which was .48678. The third lowest was Universal Automatic Machine and I gave you that figure. The fourth lowest was AMS Manufacturing Incorporated, .517482.

"Q. If H/R Products had not bid that contract, or if for some reason they had indicated after opening for the bids that they could not perform and preferred not to perform, then who would have gotten the contract? Would it have been Land-Air?

"A. After opening bid, if they didn't want to perform, then they would have to go through regulatory procedures to withdraw their bid.

"Q. There is a regulatory procedure for this?

"A. Yes.

"Q. And if it had not taken place and Land-Air had

received the contract - -

"A. (interrupting) They would be the next lowest responsive. *I don't know if they were responsible or not, but if they had the pre-award and passed they would be next in line.*

"Q. We don't know if you had a 1524 on Land-Air did we?

"A. I didn't see it.

"Q. You didn't?

"A. No. There's reasons. *Maybe they were making the item at the time. I don't know. It could have been determined as a responsible procedure.*

"Q. Let me request at this point if upon signing this deposition if a Form 1524 can be found on Land-Air, would you then attach that as Defendant H/R Exhibit?

"A. Yes.

'Q. If one is found?

"A. Yes."

No. "1524", i.e., pre-award survey form, relating to Land-Air was ever found or attached, and it is obvious that no pre-award survey of Land-Air was ever made. Thus, under Costa's testimony, Land-Air could not have been "next in line", with no pre-award survey, unless determined by a contract officer to be "responsible". *There was no such determination.*

The record even conclusively demonstrates that Land-Air could not have been considered "responsible" without a pre-award survey. As noted in the lower court's opinion, Universal received the only government contract let in 1970. This contract

was awarded on June 16, 1970, and, with additions, was still being performed when the contract in question was let in December, 1971. Thus, it is obvious that Land-Air was not "making the item at the time". No basis existed for determining Land-Air to be responsible. There is not even the slightest hint in the record or in any of the papers relating to the award of the contract in question that Land-Air fell into any category that could be considered responsible without a pre-award survey. Even H/R, which has previously furnished more Type G lifting plugs to the government than any other known company, and Universal, which was in the process of satisfying the existing contract with the government, were required to have pre-award surveys. Furthermore, the contract in question had a 50-percent option provision. Since Land-Air's bid was very close to H/R's, if Land-Air had been a viable bidder, a survey would have been made to determine if Land-Air was eligible for one-half of the award.

It is therefore apparent that Land-Air was not the subject of a pre-award survey and was not considered for the bid award. The reason for this may not be clear in the record, though the jury could certainly conclude from the evidence that Land-Air was not "responsible". However, because of the lower court's opinion, an affidavit of the Chairman of the Board and Chief Executive Officer of Land-Air was obtained, which explains why Land-Air was not considered (and why Land-Air was obviously determined not to be "responsible"). It is here reproduced:

THE STATE OF TEXAS
COUNTY OF TARRANT

KNOW ALL PERSONS BY THESE PRESENTS:

BEFORE ME, the undersigned authority, on this day personally appeared PAT RUTHERFORD, who, being by me first duly sworn upon his oath states that he is over the age of 18 years and in no way incapacitated to make this Affidavit, and that the following facts are true and correct:

My name is PAT RUTHERFORD. I was the Chairman of

the Board and Chief Executive Officer of Land-Air, Inc., and I am presently living in Honolulu, Hawaii. I am personally familiar with the facts concerning a government contract for Type "G" Lifting Plugs, which was awarded in late 1971 or early 1972 by the Ammunition Procurement Supply Agency, APSA, then located at Joliet, Illinois. I believe the government contract on this procurement was numbered DAAA-09-72-C-0208 and it is my recollection that the bids were opened on or about December 3, 1971. I had determined that after the bids were opened the second lowest bid was submitted by my Company, Land-Air, Inc. Although we were at first determined to have filed a non-responsive bid, we amended our original bid which was received by the government on or about December 1, 1971, which re-instated our bid prior to the award. In connection with our bid on this matter and I believe that the records will show that our bid was .48678 ¢ per plug, we determined from our principal supplier, Link-Belt of Indianapolis, Indiana that they were unable to supply us the unfinished plug castings or rough castings as they could not produce them sufficiently early enough to comply with the government contract in issue. Accordingly, I informed the government officials at APSA, Joliet, Illinois that my Company did not have a supply source for the unfinished plug castings and that my Company, Land-Air, Inc., was, therefore, withdrawing its bid and we did so. My company never received a pre-award survey on this particular contract because our bid had been withdrawn and I understood government procurement regulations to require such a pre-award survey before any award as a prerequisite to obtaining all or part of the government contract in issue.

We have supplied these finished Type "G" Lifting Plugs on government contracts or APSA before the fall of 1971, but we had completed our last order about a year before or sometime in 1970 and had been out of production for substantially a year at the time we submitted the bid referred to hereinabove.

/s/ PAT RUTHERFORD

Thus, the affidavit reveals that Land-Air removed itself from

consideration for the award because it was informed by its supplier, Link-Belt, that Link-Belt could not supply the necessary raw castings. Referring again to Costa's testimony, this is the prime consideration in determining whether a contractor is "responsible". This makes abundantly clear the fact that Land-Air was not in contention for the contract in question.

The affidavit is "outside the record", but the record supports the obvious jury finding that Land-Air, without a pre-award survey or contract officer's determination that it was a responsible bidder, was not considered responsible and was not eligible for the award.

If petitioners are wrong, in this, it is submitted that bringing an incontrovertible fact to the attention of the court by affidavit is proper where the lower court's opinion is based upon an erroneous conclusion with respect to that fact and the entire disposition of the cause hangs in the balance. It is within the province of this court to reverse and remand for further development of the facts, where the integrity of the judicial process so demands. *U.S. v. Shotwell Mfg. Co.*, 78 S. Ct. 245, 355 U. S. 233, 2 L. Ed. 234; *Youngstown Sheet & Tube Co. v. Lucey Products Co.*, 403 F. 2d 135 (5th Cir. 1968). The latter case holds that although, generally, failure to put on all proof necessary for a judgment is fatal error, there are occasions when innocent, and justifiably unknowing litigants are entitled to a remand to insure that substantial justice be done. This is certainly such a case, for how could plaintiffs know that the Court would deny the use of the lower price to prove fact of damage, or that Land-Air would be called a viable bidder when the bid record indicated otherwise? Obviously, therefore, if the Court concludes that the record does not justify the jury's finding, justice requires that the case be remanded.

2. Respondents' recalculations of the bid based upon the lower price extended H/R by Texas Foundries cannot be disregarded.

The Court of Appeals' opinion concludes that the recalculation of the bid based upon the lower price extended by

Texas Foundries to H/R cannot be considered for the purpose of determining whether Universal would have been low bidder in the absence of the discriminating pricing scheme. This conclusion is based on the reasoning that the Sherman Act is designed to facilitate competition and eliminate anticompetitive acts, and that application of this basic principle requires that the lower price extended to H/R be disregarded. This conclusion is novel, and apparently of first impression, but it is without authority or reason.

Facilitation of competition generally promotes lower prices and more efficient business administration. It is more reasonable to conclude, as the jury was free to do, that since Texas Foundries had the ability to extend the lower price to one competitor, it should have extended the same price to all to whom it issued price quotations. Had it done so, the record shows that Universal could and would have submitted a lower bid than H/R, and would have obtained the award.

The lower price has to be treated as a fact. It was granted by Texas Foundries to H/R. It was a part of the basis for the jury's finding of the conspiracy, and constituted an overt act pursuant to the conspiracy. Obviously, it could be considered in measuring the extent of damages. (Support for this proposition is found in the cases cited in the initial discussion of REASONS FOR GRANTING THE WRIT, *Supra*. Certainly, therefore, there is no reason to deny use of the fact (of the lower price) to prove "fact" of damage, i.e., to prove that Universal would have secured the award had it secured the same price.

The Robinson-Patman Question

With regard to the Robinson-Patman claim, the Court recognizes that H/R and Universal purchased from Texas Foundries "contemporaneously", i.e., within the same time-frame, but holds that "plaintiffs have failed to prove that the purchases were made 'in competition'". The Court reached this conclusion because of its reasoning that "the government selection under both the 1970 contract and the December, 1971 contract of a single producer for each precluded the possibility of competition

between these suppliers as a matter of law". The Court categorized the separate contracts as "separate, distinct market(s) open only to a single producer".

The latter proposition clearly is not true, for the pre-award survey contained a request that the survey cover a 50-percent option of the quantity awarded. Therefore, H/R and Universal were in competition for either one-half or 100-percent of the quantity awarded, and could have wound up selling to the same customer (the government) under the same contract. Furthermore, the fact that H/R was ultimately awarded 100-percent of the contract quantity does not keep H/R and Universal from being "competitive purchasers" as required by the act. This proposition is established by *American Can Company vs. Bruce's Juices,* 187 F. 2d 919 (5th Cir. 1951) modified 190 F. 2d 73, 74. There it was established that *American Can* extended arbitrary and discriminatory terms to *Bruce's Juices* on a item known as the "3.12 Iscan" (a can used as a container for citrus juices sold in competition with bottled drinks). This prevented *Bruce's Juices* from buying any of the 3.12 Iscans, as pointed out by the Court at page 923:

> "The fact that it was denied the benefit of the lower price on the 3.12 Iscan in the above manner made it financially impossible for Plaintiff to purchase that particular Iscan along with its competitors."

This Court then held, however, that the failure of the Plaintiff to purchase the 3.12 Iscan did not deny the Plaintiff the status of a competing purchaser under the act, stating at page 924:

> ". . .Moreover, Plaintiff was not bound to purchase the 3.12 Iscan upon such terms in order to attain the status of a competing purchaser under the act, *as its failure to do so was directly attributable to Defendant's own discriminatory pricing."*

By the same token Universal's failure to purchase either

APPENDIX

M. C. MANUFACTURING COMPANY, INC., et al., Plaintiffs-Appellees,

v.

TEXAS FOUNDRIES, INC., et al., Defendants-Appellants.

No. 74-2246.

United States Court of Appeals, Fifth Circuit.

Aug. 21, 1975.

A private antitrust action was brought wherein plaintiffs claimed that defendants had conspired to restrain trade in violation of section 1 of Sherman Act through the utilization of an illegal price discrimination scheme. The United States District Court for the Eastern District of Texas, at Marshall, William M. Steger, J., entered judgment for plaintiffs, and defendants appealed. The Court of Appeals, Clark, Circuit Judge, held that plaintiff which failed to prove that in the absence of defendants' discriminatory pricing scheme it would have received government supplier contract in question failed to present jury issue on Sherman Act claim; and that purchases were not made "in competition," as required in order to establish Robinson-Patman Act discriminatory pricing claim.

Reversed.

1. **Monopolies—28(7.1, 7.2)**
Proof of existence of an actionable conspiracy is not enough to establish a section 1 Sherman Act claim; in addition to proof that antitrust laws were violated, a plaintiff must also establish that such violation proximately caused injury to his business and adduce evidence that at least gives an indication of the amount of damage which resulted. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

2. **Monopolies—28(8)**
Plaintiff which failed to prove that in the absence of defendants' discriminatory pricing scheme it would have received government supplier contract in question failed to present jury issue on Sherman Act claim, where evidence disclosed that even if defendant supplier's bid had been disregarded plaintiff would not have been the low bidder, despite plaintiff's hypothetical recalculation of its bid based upon prices the conspiracy fetched for defendant supplier. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

3. **Monopolies—10**
Purpose of Sherman Act is preservation of open, competitive marker. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

4. **Monopolies—28(7.6)**
Damages are recoverable in private suit on Sherman Act claim only upon showing that in the absence of anticompetitive practice complained of plaintiff would not have suffered the loss asserted. Clayton Act, § 4, 15 U.S.C.A. § 15.

5. **Trade Regulation—911**
In order for there to be discrimination between purchasers violative of section 2(a) of Clayton Act, there must be actual sales at two different prices to two different actual buyers. Clayton Act, § 2(a, f) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a, f).

6. **Trade Regulation—914**
Robinson-Patman legality of price discrimination between contracts to purchase that contemplate contemporaneous delivery must be evaluated as of dates the respective contracts were made. Clayton Act, § 2(a, f) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a, f).

7. **Trade Regulation—913**
Discriminatory pricing is violative of Robinson-Patman only when it lessens or tends to prevent competition between customers or between sellers. Clayton Act, § 2(a, f) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a, f).

8. **Trade Regulation—913**
To constitute a Robinson-Patman wrong, price discrimination must occur between competitors in comparable transactions, that is, where persons receiving different prices are in actual, functional competition with one another, and must have requisite effect upon actual or potential competition. Clayton Act, § 2(a, f) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a, f)

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9. Trade Regulation—913

Even if sales at different prices are contemporaneous, involve goods of like grade and quality, price distinction is not justified by good business cause and it causes injury to the disadvantaged purchaser, recovery under Robinson-Patman Act is precluded absent proof that price variance detrimentally affected competition. Clayton Act, s 2(a, f) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. s 13(a, f).

10. Trade Regulation—913,932

Competition between buyers at disparate prices is essential to a violation of Robinson-Patman Act and existence of this requisite is normally a fact question to be determined by making a realistic appraisal of all relevent facts. Clayton Act, s 2(a, f) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. s 13 (a, f).

11. Trade Regulation—913

Purchases were not made "in competition" as required in order to establish Robinson-Patman Act Discriminatory pricing claim, where plaintiff contractor's purchases of lifting plugs could only be accepted by government in fulfillment of 1970 contract while defendant contractor's purchases similarly could be used only on 1971 contract and, regardless of subsequent discrepancy in price to these suppliers, by defendant seller, government had to purchase from each, and only from each, the specified number of plugs at agreed price under respective contracts. Clayton Act, s 2(a, f) as amended by Robinson-Patman Price Discrimination Act,15 U.S.C.A. s 13(a, f).

12. Trade Regulation—913

Injury to a competitior is not test for Robinson-Patman violation; test is injury to competition. Clayton Act, s 2(a, f) as amended by Robinson-Patman Price Discrimination Act, 15 U.S. C.A. s 13(a, f).

Appeal from the United States District Court for the Eastern District of Texas.

Before GOLDBERG, CLARK and GEE, Circuit Judges.

CLARK, Circuit Judge:

Plaintiffs, M. C. Manufacturing Company, Inc. (M.C.), and its wholly-owned subsidiary, Universal Automatic Machine Company, Inc. (Universal), initiated this private antitrust action against defendants, Texas Foundries, Inc. (Texas Foundries) and H/R Products, Inc. (H/R), alleging that the defendants conspired to restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. s 1, through the utilization of a price discrimination scheme which also was violative of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. s 13(a & f). Trial to a jury resulted in a general verdict for plaintiffs of $73,000.00 which was then trebled by the trial court to $219,000.00. Texas Foundries and H/R petition this court for relief from the judgment entered pursuant to that award. We reverse.

Universal alleges that this controversy arose while it and H/R were actively competing for a December, 1971 government contract to supply a finished military hardware item known as a Type "G" lifting plug,[1] because Texas Foundries quoted H/R a lower price than it quoted Universal to supply the required unfinished plug castings.[2] According to plaintiffs, H/R and Texas Foundries clandestinely agreed by telephone on the 29th of November, 1971, to a price of 31 cents per unfinished plug casting delivered to H/R's plant (South Bend, Indiana). Texas Foundries had quoted Universal a price of 32.5 cents f.o.b. Texas Foundries' plant (Lufkin, Texas) only 11 days earlier, on the 18th of November. Plaintiffs assert that the price discrepancy between the two offers was the result

1. The Type "G" lifting plug is a malleable iron device which the military services use to lift 155 mm. artillery projectiles. The lifting plug has a loop at one end, known as the "bail," and is threaded on the other end for insertion into the nose of an unfused artillery projectile, thereby facilitating the movement of such projectiles. When a projectile is to be fired, the lifting plug is removed and replaced by an appropriate fuse. Because their purpose is use with large caliber munitions, the only end-user market for lifting plugs is the military arm of the United States government.

2. The term "unfinished plug casting" refers to a basic casting made by a foundry which has not been machined and threaded into its final form as a lifting plug which will meet contract specifications.

of a conspiracy between Texas Foundries and H/R in violation of Section 1 of the Sherman Act aimed at the destruction of Universal as a competitor. They further assert that the ultimate sale to H/R of a portion of the castings required to perform the contract at the lower price constituted a violation of the Robinson-Patman Act's proscription of price distinctions between purchasers since on November 12, 1971, Texas Foundries and Universal had entered into a subcontract at 32.5 cents per casting to fulfill a prior government contract award to Universal.[3]

For their part, the defendants contend that Texas Foundries' agreement to sell to H/R at a lower price was reached after the December, 1971 contract had been awarded and then only after H/R's intended suppliers communicated to H/R that they could not satisfy H/R's requirements. They further contend the price reduction by Texas Foundries was intended to meet the price offered by H/R's other suppliers and to find a market for a substantial overage of castings which had been produced under Texas Foundries' preexisting contract with Universal.[4]

Because the particular facts underlying this case are crucial to our resolution of the controversy, a detailed review of the events leading to selection of a contractor on government contract No. DAAA—09—72—C—0208 is warranted.

On October 27, 1971, the Ammunition Procurement Supply Agency (APSA) distributed a solicitation inviting bids on a contract to supply 1,984,006 Type "G" lifting plugs. A total of 159 prospective bidders were solicited, of which 16, including Universal and H/R, ultimately submitted bids.

Upon receiving a solicitation from the APSA, Universal asked Texas Foundries to bid on a subcontract to supply unfinished plug castings. On November 18, 1971, Texas Foundries responded with a 32.5-cent per casting price, f.o.b. Texas Foundries' plant. Based upon Texas Foundries' quotation for the unfinished plug, Universal submitted a final bid to APSA of 49.28 cents per finished plug. During the time prior to opening of bids, Texas Foundries was also called upon by several other potential bidders to give similar casting price quotations. As a result, Texas Foundries sent written quotations to both Deco Grand, Inc., an uninvolved third party, and H/R containing the identical price quoted Universal, *i. e.*, 32.5 cents per casting, f.o.b. Texas Foundries' plant.

The sixteen bids ultimately received on the APSA contract were opened on December 3, 1971, revealing that H/R was the low bidder at 47.6 cents per casting, Land-Air, Inc. was second at 48.8 cents per casting, and plaintiff, Universal, was the third lowest bidder at 49.28 cents per casting. Pre-award surveys and cost evaluations[5] were then conducted on the lowest group of bidders.[6] These studies resulted in evaluated bids (lowest cost to government) of 47.362 cents per plug for H/R, 48.678 cents per plug for Land-Air, Inc. and 49.107 cents per plug for Universal. Having thus entered the lowest evaluated bid and having received a satisfactory pre-award survey analysis, H/R was awarded the contract on December 30, 1971.

3. Universal had been successful on June 16, 1970 in bidding on a similar government contract. This award to Universal was for 2,033, 950 plugs with an "add-on" award of 450,000, plus a negotiated addition of 750,000 plugs.

4. Universal purchased approximately 1,500,000 unfinished plugs from Texas Foundries while fulfilling its 1970 contract with add-ons and additions.

5. The pre-award survey involves government assessment of such factors as a bidder's financial status, production capability, technical capability, plant facilities and quality assurance capabilities; while the cost evaluation takes into account such factors as transportation costs, a bidder's use of government-owned equipment or facilities and discounts. That bidder who is shown to have the bid which evaluates lowest along with a feasible pre-award survey is then considered eligible for an award. The award must be made to that responsible bidder who submitted the lowest responsible bid, "unless there is a compelling reason to reject all bids and cancel the invitation." 32 C.F.R. s 2.404-1.

6. Land-Air was not surveyed because of an original determination that its bid was not responsive. After amendment, however, Land-Air's bid was reinstated and evaluated. *See* Text, infra at pp. 7419, 7420.

SHERMAN ACT CLAIM

At trial plaintiffs' evidence tended to show a discriminatory pricing conspiracy between Texas Foundries and H/R aimed at the destruction of Universal as a producer of Type "G" lifting plugs. From the outset, plaintiffs have contended that on the 29th of November, 1971, Texas Foundries and H/R consummated a secret telephonic agreement whereby Texas Foundries committed itself to supply unfinished plugs to H/R at 31 cents per casting, at H/R's plant, after only eleven days earlier having assured Universal that a 32.5 cent per casting price, f.o.b. Texas Foundries plant, was the lowest price it could possibly offer. The reason for this discrepancy in price quotations is found, according to plaintiffs in H/R's precarious financial situation in November of 1971. Until 1970, the year of Universal's entry into the lifting plug market, H/R had been the leading producer of military lifting plugs. In 1970, however, Universal received the only government contract let that year, causing H/R a concomitant 60,000 dollar loss. At this point, plaintiffs' theory continues, realizing that failure to obtain the 1971 contract would necessitate abandonment of its plug business and fully aware that Universal's failure to get at least a portion of the 1971 contract would portend the latter's business demise,[7] H/R resolved to take whatever steps were necessary (including participation in a discriminatory pricing scheme) to insure that it would not again be underbid by Universal.[8]

[1] If plaintiffs' theory of the case and version of the evidence were accepted by the jury, as they may have been, then a Sherman Act violation has been established. We assume arguendo that the jury verdict was based on this premise, and that it was supported by the evidence. Under Section 1, 15 U.S.C. s 1, "Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal." However proof of the existence of an actionable conspiracy is not enough. In addition to proof that the antitrust laws were violated, a plaintiff must also establish that such violation proximately caused injury to his business and adduce evidence that at least gives an indication of the amount of damage which resulted. Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 20 (5th Cir.), *rehearing en banc denied*, 496 F.2d 878, *cert. dismissed*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974); Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690 (5th Cir. 1975).

[2] Under the facts of this case, plaintiffs failed the second of this three-pronged test, *i. e.*, they failed to prove that an injury to Universal resulted from defendants' discriminatory pricing scheme. While the fact of injury most often involves evidentiary questions which are properly for the jury [*e. g.*, Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562, 51 S.Ct. 248, 250, 75 L.Ed. 544, 548 (1931)] no such jury issue exists where, as here, plaintiffs failed to establish that in the absence of defendants' discriminatory pricing scheme Universal would have received this contract. Thus, the trial court erred in refusing to direct a verdict for defendants on the Sherman Act claim at the close of plaintiffs' case.

Plaintiffs' premise is that, absent the illegal bid to H/R, Universal would have received the contract. However, the facts as adduced at trial reveal that even if H/R's bid is disregarded, Universal would not be the low bidder. Rather,

7. In fact, after losing the 1971 contract to H/R Universal was unable to acquire other work in the commercial field sufficient to hold its shop intact, and finally had to liquidate its equipment.

8. Other evidence supportive of plaintiffs' conspiracy theory included: proof that H/R would not consider itself able to bid unless it had positive commitments for all the plug castings it would need; H/R's knowledge prior to submission of its bid that its registered supplier, Marion Malleables, could not produce the rough castings in sufficient quantity to satisfy government requirements; H/R's assertion that still another supplier, F.M.C. Corporation, would supply the additional plugs necessary to meet the government's requirements, while during trial H/R's President admitted that no firm commitment was received from F.M.C. until after the contract was awarded; H/R's failure to notify the government of its "change" in suppliers until specifically asked to do so despite the requirements of pre-award disclosure and contract-in-process certifications; and Texas Foundries' realization that it would have a substantial overrun on its contract with Universal unless it found an alternate market for this material.

Land-Air, Inc., a party wholly unconnected with either defendant, stands second behind H/R. Thus, without H/R's bid, Universal still would not have received the contract. To show that the asserted conspiracy did in fact injure them, plaintiffs contend that Land-Air was not a viable intermediary. They point out that its bid was classified by the APSA as unresponsive and therefore its position should not be considered. While it is true that Land-Air's bid was initially classified as non-responsive and consequently Land-Air did not receive a pre-award survey, a memo from the APSA contract specialist in charge of contract DAAA–09–72–C–0208 negotiations introduced at trial reveals that an amendment was received from Land-Air on December 1, which negated the previous non-responsive action considered, and led to reinstatement of Land-Air's bid prior to award. It is crystal clear that Land-Air was a viable bidder and that, even after disregarding H/R's low bid because of the special, conspiratorially low price it received from Texas Foundries, Land-Air's bid stood between Universal and the opportunity to acquire this contract.

Plaintiffs attempted to circumvent the intervening position of Land-Air, Inc. through a hypothetical recalculation of the bid submitted by Universal. This recalculation was based upon the assumption that Universal should be entitled to utilize a price per casting equivalent to the 31-cent f.o.b. South Bend price which the conspiracy fetched for H/R. By utilizing this price and applying the same profit and other cost factors it had employed in submitting its bid based upon the 32.5-cent price, Universal calculated it would have bid an amount below those entered by both H/R and Land-Air, Inc., thus seeking to show the conspiracy did cost it the contract award. The fallacy in this theory, however, is Universal's utilization of the 31-cent delivered price given to H/R.

[3, 4] The avowed purpose of the Sherman Act is the preservation of the open, competitive market. See, *e. g.*, Northern Pac. Ry. v. United States, 356 U.S. 1, 4, 78 S.Ct. 514, 517, 2 L.Ed.2d 545 (1958); Apex Hosiery Co. v. Leader, 310 U.S. 469, 492–93, 60 S.Ct. 982, 992, 84 L.Ed. 1311 (1940). Damages are recoverable thereunder if a plaintiff can show that the anticompetitive practice which inhibits that protected freedom of competition has proximately caused the damages he asserts. 15 U.S.C. s 15. For the case at bar, this rule means that damages are recoverable only upon a showing that absent the anticompetitive practice plaintiff would not have suffered the loss. The anticompetitive conduct which the evidence tended to establish in the case at bar was Texas Foundries' special 31-cent price to H/R, not its refusal to offer a comparable price to H/R's competitors. The price of 32.5 cents f.o.b. Texas Foundries plant was shown to be the standard or usual market price quoted in connection with this bidding. It was the price initially quoted to H/R. It was the only price quoted to Universal and it was also the price quoted to an univolved third party, Deco Grand, Inc. Evidence of Texas Foundries' other dealings during this period further confirms that the 31-cent price was the conspiratorial price.[9]

Restoration of the competitive freedom which the Sherman Act is designed to protect through elimination of the anticompetitive practice is accomplished here by disregarding the special conspiratorial price to H/R, not by hypothetical broadening of the conspiracy to give H/R's abnormally low price to Universal as well. The problem for Universal is that it is not enough to merely restore the open competitive market status by knocking out the conspiracy, for then Land-Air, not Universal, would have become the lowest bidder. But more cannot be done. The result is that the conspiracy did not cause the damages upon which recovery was based, and, therefore, the verdict cannot be sustained under the Sherman Act.

ROBINSON-PATMAN ACT CLAIM

Plaintiffs also assert that defendants' buy-sell agreement at 31 cents per casting was violative of Section 2(a & f) of the Clayton Act as amended by the Rob-

9. Texas Foundries charged Universal the 32.5-cent price in their November, 1971 purchase-order contract for 740,000 plugs to complete Universal's 1970 contract addition. In neither of their previous purchase-order contracts did Texas Foundries' price drop below 32 cents per unfinished plug casting. While the issue of which party was to pay the freight is in dispute under two of these contracts, under no circumstance would the ultimate cost to Universal per unfinished plug casting ever fall below the 31 cents f.o.b. South Bend price granted H/R.

inson-Patman Act, 15 U.S.C. s 13(a & f). Under Section 2(a), it is unlawful for any person engaged in commerce to discriminate in price (1) between different purchasers (2) of commodities of like grade and quality (3) where the effect of such discrimination is to substantially lessen competition or tend to create a monopoly, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination and (4) where such differential is not in response to changing market conditions,[10] while under Section 2(f), it is unlawful to knowingly induce or receive discrimination in price prohibited by this section.

[5, 6] Recognizing that in order for there to be discrimination between purchasers violative of s 2(a) "there must be actual sales at two different prices to two different actual buyers,"[11] plaintiffs pursue the Robinson-Patman claim on the basis of the price discrepancy between Universal's purchase-order contract with Texas Foundries dated November 12, 1971 and H/R's clandestine November 29th agreement with Texas Foundries which related to the December 30, 1971 contract.[12] These separate contracts contemplated contemporaneous delivery of Type "G" lifting plugs during 1972 but H/R was given a price of 31 cents delivered at its plant while Universal was given the substantially higher price of 32.5 cents at Texas Foundries' plant.[13]

Alternatively, plaintiffs argued at trial that a Robinson-Patman violation had occurred even if the jury believed that no agreement was reached by Texas Foundries and H/R on the 29th of November, but rather was made later—after the contract was awarded—and as a result of the failure of H/R's expected supplier to produce. They contend that even a January, 1972 agreement would still be reasonably contemporaneous with the November, 1971 agreement between Texas Foundries and Universal, since delivery was contemplated during the same periods under both contracts and no justification based upon a change in market conditions or good faith meeting of competition was shown.

Defendants contest the sufficiency of proof on every element essential to a Robinson-Patman Act violation. We need not weigh each element, however, as our conclusion that plaintiffs have failed to prove that the purchases were made "in competition" forestalls the necessity of further consideration of plaintiffs' claim under the Act.

[7-9] Discriminatory pricing is violative of Robinson-Patman only when it lessens or tends to prevent competition between customers or between sellers.[14] To constitute a Robinson-Patman wrong, the price discrimination must occur between competitors in comparable transactions—*i. e.*, where persons receiving the different prices are in actual, functional competition with one another—and it must have the requisite effect upon actual or potential competition.[15] Even if the sales at different prices are contemporaneous, involve goods of like grade and quality, the price distinction is not justified by good business cause, and it causes injury to the disadvantage purchaser, recovery under the Act is precluded absent proof that the price variance detrimentally affected competition.[16]

[10-12] Competition between the buyers at disparate prices is essential to a violation of the Robinson-Patman Act, *see* Ag-Chem Equipment Co., Inc. v. Hahn, Inc., 480 F.2d 482, 490-91 (8th Cir. 1973), and the existence of this requisite is normally a fact question to be determined by making a realistic appraisal of all the relevant facts. F.T.C. v. Sun Oil Co., 371 U.S. 505, 527, 83 S.Ct. 358, 9 L.Ed.2d 466 (1963). However, in the case at bar the relevant facts are without dispute. The government's selection under both the 1970 contract addition and the December, 1971 contract of a single producer for each precluded the possibilty of competition between these suppliers as a matter of law. Universal's purchases proven here could only be accepted by the government in fulfillment of the 1970 contract addition, while H/R's purchases similarly could be used only on the 1971 contract. Regardless of a subsequent discrepancy in price to these suppliers, the government had to purchase *from each*, and only from each, the specified number of plugs at the agreed price under the respective contracts. This being established, the trial court erred in not granting defendants' motion for directed verdict on this aspect of plaintiffs' case.

It cannot be gainsaid that Universal and H/R were competitive *bidders* on the 1971 contract. They could not be, however, competitive purchasers as required by the Act either under their respective separate contracts or under both.[17] It is the government's unavailability to Universal as a customer of any of the government's needs under the December, 1971 contract, and its similar unavailability to H/R on the 1970 contract addition which prevents purchases made in performance on one from being in competition with those made under the other. Each contract represented a separate, distinct market open only to a single producer. Once it was awarded the

10. In addition to the defense of changing market conditions, a defendant may rebut a primafacie case of discrimination by showing that his lower price was made "in good faith to meet an equally low price of a competitor." 15 U.S.C. s 13(b). Since, as discussed *infra*, plaintiffs have failed to prove a prima-facie case we do not decide the applicability *vel non* of these defenses under the facts of this case.

11. Jones v. Metzger Dairies, Inc., 334 F.2d 919, 924 (5th Cir. 1964), *cert. denied*, 379 U.S. 965, 85 S.Ct 659, 13 L.Ed.2d 559 (1965); *accord*, Stough v. May and Co., Inc., 484 F.2d 22, 23 (5th Cir. 1973); Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4, 7 (5th Cir.), *cert. denied*, 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed.2d 177 (1969). The term "purchaser" means a buyer or vender, not one who merely seeks to purchase. *E. g.*, Chicago Seating Co. v. S. Karpen & Bros., 177 F.2d 863 (7th Cir. 1949); Shaw's Inc. v. Wilson-Jones Co., 105 F.2d 331, 333 (3rd Cir. 1939).

12. Universal contracted with Texas Foundries on November 12 for the purchase of 740,000 unfinished plug castings (with delivery to continue through February, 1972) to fulfill the government's addition to Universal's 1970 contract H/R's agreement with Texas Foundries was of course in contemplation of H/R's attainment of the December, 1971 contract and required delivery beginning in January, 1972.

13. The Robinson-Patman legality of price discrimination between contracts to purchase that contemplate contemporaneous delivery, must be evaluated as of the dates the respective contracts were made. *See*, Texas Sulphur Co. v. J. R. Simplot Co., 418 F.2d 793, 806 (9th Cir. 1969).

14. 15 U.S.C. s 13(a). *E. g.*, F.T.C. v. Sun Oil Co., 371 U.S. 505, 527, 83 S.Ct. 358, 9 L.Ed.2d 466 (1963); Atlas Building Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 954 (10th Cir. 1959), *cert. denied*, 363 U.S. 843, 80 S.Ct. 1608, 4 L.Ed.2d 1727 (1960). Hartley & Parker, Inc. v. Florida Beverage Corp., 307 F.2d 916, 921 (5th Cir. 1962); Chicago Sugar Co. v. American Sugar Refining Co., 176 F.2d 1, 7 (7th Cir. 1949); Great Atlantic & Pacific Tea Co. v. F.T.C., 106 F.2d 667, 676 (3rd Cir. 1939), *cert. denied*, 308 U.S. 625, 60 S.Ct. 380, 84 L.Ed. 521 (1940) B. & W. Gas, Inc. v. General Gas Corp., 247 F.Supp. 339, 343 (N.D. Ga. 1965).

15. F.T.C. v. Borden Co., 383 U.S. 637, 643, 86 S.Ct. 1092, 1097, 16 L.Ed.2d 153 (1966). *See* Texas Gulf Sulphur Co. v. J. R. Simplot Co., 418 F.2d 793, 806 (9th Cir. 1969), Tri-Valley Packing Ass'n v. F.T.C., 329 F.2d 694 (9th Cir. 1964); Refrigeration Engineering Corp. v. Frick Co., 370 F.Supp. 702, 712-13 (W.D.Tex. 1974). "Essentially, we have in the particular situation an analogue to standing. The customer has standing only to raise and compare those sales which are injurious to his competition." Mayer Paving & Asphalt Co. v. General Dynamics Corp., 486 F.2d 763, 770 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146, 94 S.Ct. 899, 39 L.Ed.2d 102 (1974).

16. *See, e. g.*, Texas Gulf Sulphur Co., *supra*; S. S. Kresge Co. v. Champion Spark Plug Co., 3 F.2d 415, 420 (6th Cir. 1925).

17. We emphasize it was the bids on the December, 1971 contract which were in competition—not the old and new sales assailed here. These bids alone cannot form the basis for a Robinson-Patman Act claim since they do not satisfy the two-purchaser requirement. A. J. Goodman & Son, Inc. v. United Lacquer Manuf. Corp., 81 F.Supp. 890, 892 (D.Mass.1949). *See* text at note 11, *supra*. We note this circuit's decision in American Can Co. v. Bruce's Juices, Inc., 187 F.2d 919, 924 (5th Cir.), *cert. dismissed*, 342 U.S. 875, 72 S.Ct. 165, 96 L.Ed. 657 (1951), which appears to

bid, which was a prerequisite to becoming a purchaser from Texas Foundries, Universal's 1970 contract addition was assured to it to the exclusion of all other suppliers regardless of any discrepancy in prices paid on underlying subcontracts. In the same fashion, the government pledged itself unconditionally under the 1971 contract to purchase the specified quantity of finished plugs exclusively from H/R. The very nature of these mutually exclusive commitments in the respective contracts meant that Universal and H/R could not have been "in competition" with respect to their separate purchases from Texas Foundries pursuant to the government contracts. Therefore, while the price discrepancy between the two actual purchases (as distinguished from the bids related to the 1971 contract) could have affected Universal's profits under the addition to its 1970 contract, this discrimination in no way diminished Universal's competitive ability in that plug market. "Injury to a competitor is not the test; the test is injury to competition." Lloyd A. Fry Roofing Co. v. F.T.C., 371 F.2d 277, 281 (7th Cir. 1966). *Accord*, GAF Corp. v. Circle Floor Co., Inc., 463 F.2d 752 (2nd Cir. 1972), *cert. dismissed*, 413 U.S. 901, 93 S.Ct. 3058, 37 L.Ed.2d 1045 (1973).

"Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise. But as a necessary incident thereto, it is concerned with predatory price cutting which has the effect of eliminating or crippling a competitor. For, surely there is no more effective means of lessening competition or creating monopolies than the debilitation of a competitor." Atlas Building Products Co. v. Diamond Block & Gravel Co., *supra*, 269 F.2d at 954. *Accord*, Borden Co. v. F.T.C., 381 F.2d 175, 178 (4th Cir. 1967). Universal cannot avail itself of this approach because it failed to show an injury to competition generally or that the revenue lost under the contract addition impaired its individual competitive status.[18]

Plaintiffs' Robinson-Patman claim is presented in a setting analogous to the situation where, although a seller sells his product at different discriminatory prices, he is not liable under Robinson-Patman because his buyers are not in competition for the same ultimate users.[19] In our case, although the government is the ultimate user under both contracts, those individual contracts constitute separate, distinct markets, each unaffected by prices available in

create a special exception to the two-purchaser requirement where competitors in the same market are engaged in competitive purchasing and selling at the time of the price discrimination and where the failure of the plaintiff to consummate a second purchase of the item discriminatorily priced is directly attributable to defendant's own discriminatory practice. We conclude, however, that this exception is inapplicable on the facts now before us.

Specifically, in *Bruce's Juices*, the court held that plaintiff could bring a Robinson-Patman Act claim against defendant can manufacturer for defendant's refusal to offer plaintiff the same price on a particular type of can offered plaintiff's competitors, in spite of plaintiff's failure to purchase that particular type of can, where plaintiff was purchasing other types of cans not so discriminatorily priced and competing for the sale of its product packaged in such cans in the same market as its favored competitor. In our case, however, Universal and H/R never *purchased* in the same market. As mentioned previously, they were producing at all

times pursuant to mandatory, single-producer contracts, *i. e.*, when they purchased unfinished plug castings it was always pursuant to a preexisting government commitment that could not be altered upon the government's ability to find a lower price after entry into the contract. For this reason, the *Bruce's Juices* exception is not applicable here.

18. On the contrary, Universal must have felt that its profitability on all phases of the 1970 contract was satisfactory since it quoted its finished plug "addition" price to the government based upon a 32.5-cent casting price from Texas Foundries. Thus, though Universal could have realized an increased profit if it had received a lower casting price from Texas Foundries and not passed the savings on, even this hypothetical profit was not shown to have had the necessary deleterious competitive effect. While Universal did establish its business demise (See note 7), its proof of causation related to the deleterious effect of the failure to acquire the 1971 contract rather than the loss of profit on the 1970 contract addition.

the other. Universal and H/R were not competing for the same consumer dollar in their activities under the 1970 and the 1971 contracts."

There being no theory which will support plaintiffs' Sherman or Robinson-Patman Act claims, the judgment below is

Reversed.

20. "The whole thrust of the Robinson-Patman Act concerns protection of competition for resale. . . . Competition is determined by careful analysis of each party's customers. Only if they are each directly after the same dollar are they competing." Ag-Chem Equipment Co., Inc. v. Hahn, Inc., 350 F.Supp. 1044, 1051 (D.Minn.1972), *modified on other grounds*, 480 F.2d 482 (8th Cir. 1973).

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APPENDIX - 10

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-2246

D. C. Docket No. CA 1614

M. C. MANUFACTURING COMPANY, INC., ET AL.,
Plaintiffs-Appellees,

versus

TEXAS FOUNDRIES, INC., ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the
Eastern District of Texas

Before GOLDBERG, CLARK and GEE, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the **Eastern District of Texas, and was argued by counsel;**

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, **reversed;**

It is further ordered that plaintiffs-appellees pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

August 21, 1975

Issued as Mandate:

APPENDIX - 11

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-2246

M. C. MANUFACTURING COMPANY, INC., ET AL.,
Plaintiffs-Appellees,

versus

TEXAS FOUNDRIES, INC., ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the
Eastern District of Texas

ON PETITION FOR REHEARING

(November 12, 1975)

Before GOLDBERG, CLARK and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1083

M. C. MANUFACTURING CO., INC., AND
UNIVERSAL AUTOMATIC MACHINE CO., INC.
Petitioners,

v.

TEXAS FOUNDRIES, INC., AND H/R PRODUCTS, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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FIDELITY PRINTING COMPANY, HOUSTON

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Respondents, Texas Foundries, Inc. and H/R Products, Inc. (hereinafter referred to as "Texas Foundries" and "H/R", respectively), respectfully submit this their Brief in Opposition to Petitioners' Petition for Writ of Certiorari and respectfully pray that the Court deny issuance of the writ.

OPINIONS BELOW

Respondents admit that Petitioners' references to the opinions of the courts below are correctly stated.

JURISDICTION

Respondents admit that the Court has discretionary jurisdiction to grant the writ under 28 U.S.C. § 1254(1), but Respondents deny that there are any "special and important reasons," as required by Rule 19(1) of the Rules of the Supreme Court of the United States, for issuing a writ in this case.

QUESTIONS PRESENTED

Respondents admit that Petitioners present one question arising under the Sherman Act and one question arising under the Robinson-Patman Act. Respondents entirely disagree with Petitioners' characterizations of the nature of those questions, however, and here restate the issues raised. In addition, if the Court should issue its writ in this case, Respondents will assert by cross-point fourteen other questions that were presented to, but which were not decided by, the Court of Appeals.

The Sherman Act Question

Respondents agree that the Court of Appeals held that Petitioners failed to prove the *fact* of injury (as distinguished from the *amount* of injury) resulting from an alleged violation of Section 1 of the Sherman Act. Petitioners misconceive the basis for that holding when they suggest that the court below concluded that the allegedly discriminatory price from Texas Foundries to H/R could not be considered at all in testing the fact of damage. In fact, the Court of Appeals squarely ruled that when a Sherman Act violation is alleged to have resulted from the granting of a special, discriminatorily low price to one of plaintiff's competitors, the fact of injury is not tested by hypothesizing what plaintiff's situation would have been if it too had received an illegal and discriminatory price but should instead be tested by determining what plaintiff's position would have been had the discriminatory price not been granted to one of its competitors. Thus, the first question is as follows:

1. Did the Court of Appeals correctly conclude that Petitioners failed to establish the fact of injury where,
   (a) the evidence shows that Universal would have been in no better a position had Texas Foundries not extended the "discriminatory price" to H/R, and

   (b) the record evidence conclusively establishes that the second-low bidder's bid "stood between Universal and the opportunity to acquire this contract"?[1]

The Robinson-Patman Act Question

Petitioners statement of this issue does not reflect the actual basis of the decision of the Court of Appeals. As one major basis for its decision, the Court of Appeals held that the Government's selection of single producers under each of the contracts in question "precluded the possibility of competition between these suppliers as a matter of law."[2] Thus, the Court of Appeals found as a matter of fact and of law that the parties were not in competition (for Robinson-Patman Act purposes), and the second question presented is therefore as follows:

2. Did the Court of Appeals correctly conclude that Petitioners failed to establish a Robinson-Patman Act violation where the two "purchasers" in question were not competing, and could not compete, in *supplying* the same government contract (as opposed to bidding for the same contract)?

Respondents' Questions Pretermitted by the Court of Appeals

If a writ of certiorari should issue in this case, Respondents will present to the Court each of the following points, which were presented to the Court of Appeals and which were expressly pretermitted by that court. Each of these points provides an alternative ground justifying the result reached by the Court of Appeals and they are here merely listed without discussion:

1. Did the trial court err in submitting this case to the jury and in allowing the jury's verdict to stand

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[1] Opinion below, 517 F.2d 1059, 1064; Petitioners' Appendix at 5.
[2] *Id.*, 517 F.2d at 1066-67; Petitioners' Appendix at 7.

because the record contains no evidence sufficient to support a finding that Respondents entered the alleged agreement in November 1971?

—. Did the trial court err in submitting this case to the jury and in allowing the jury's verdict to stand because the record does not support findings of the existence of all elements necessary to the anti-trust violation alleged:

2. *Two purchases:* Does a price quotation to one company followed by a sale to another company satisfy the "two purchases rule"?

3. *Contemporaneous sales:* Does making deliveries under a contract made with one company on November 12, 1971 at the time of entering another contract with a different company on January 17, 1972, satisfy the "contemporaneous sales" requirement?

4. *Like grade and quality:* Are raw castings of Type "G" lifting plugs with the gate stubs left on of "like grade and quality" as castings with gate stubs ground off?

5. *Substantial effect on competition:* Does this record contain evidence sufficient to support a finding that the effect of Respondents' dealings would substantially "lessen competition"? [*indirectly decided by the Court of Appeals*]

6. *Knowing inducement or receipt*: Does this record contain evidence sufficient to support a finding that H/R knowingly "induced or received a discrimination in price"?

7. In regard to Respondents' point 3, did the trial court err in allowing witness Childress to testify that Universal "purchased" from Texas Foundries on the date of delivery rather than on the date of contracting?

—. Did the trial court err in submitting this case to the jury and in allowing the jury's verdict to stand because the record conclusively establishes the existence of statutory defenses:

8. *Meeting competition*: Does the record conclusively establish that Texas Foundries' price to H/R was "made in good faith to meet an equally low price of a competitor"?

9. *Changed market conditions:* Does the record conclusively establish that Texas Foundries price to H/R was "in response to changing conditions affecting the market for or the marketability of the goods concerned"?

10. Did the trial court err in submitting the damages issue to the jury and in allowing the jury's verdict to stand because the record contains no evidence to support a finding on damages that is not wholly speculative and conjectural?

11. In regard to Respondents' point 10, did the trial court err in allowing witness Childress to testify that Universal made a profit on the sale of finished lifting plugs?

12. In regard to Respondents' point 10, did the trial court err in admitting into evidence Petitioners' exhibits 96, 97, 98, and 99?

13. Is the award of damages in this case excessive?

14. Did the trial court err and deny Respondents their right to a jury trial by delivering an impermissible "Allen charge" to the jury?

STATUTES INVOLVED

Respondents admit that Petitioners correctly cite and reproduce the relevant provisions of Section 1 of the Sherman Act and Section 4 of the Clayton Act. The Petition contains an apparent typographical error as to the citation of the Robinson-Patman Act, however, and fails to reproduce all the relevant portions of that statute. The relevant portions are Sections 2(a), (b) and (f) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §§ 13(a), (b) and (f), which provide in pertinent part as follows:

"(a) It shall be unlawful for any person engaged in commerce . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition . . . or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . . *Provided* . . . That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

• • • •

"(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

STATEMENT OF THE CASE

Respondents agree that the facts of the case are accurately set forth in the opinion of the Court of Appeals. As

discussed below, Petitioners' challenge to those facts is *dehors* the record and is thus not before the Court.[3]

REASONS FOR DENYING THE WRIT

First and foremost among the many reasons for this Honorable Court's declining to exercise its discretionary power to issue a writ of certiorari is the clear fact that the United States Court of Appeals for the Fifth Circuit has already reviewed the 2,668 pages of the record on appeal,[4] thoroughly analyzed the complex maze of facts contained therein, and reached the correct, just and proper result under both settled case law and the facts.

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[3] Because of Petitioners' submission of the Rutherford Affidavit, which is not in the Record on Appeal from the trial court, Respondents conditionally offered counter-affidavits to the Court of Appeals and asked that the same be considered only in the event that the Rutherford Affidavit was accepted for any purpose. Such counter-affidavits are attached hereto as the Appendix.

The Court of Appeals rendered its opinion on August 21, 1975. Thereafter and in connection with their filing of a Motion for Rehearing, Petitioners tendered to the Court of Appeals the Affidavit of Pat Rutherford, which is reproduced at pages 15 to 16 of the Petition. The Rutherford Affidavit was dated September 9, 1975, and purported to refute the factual recitations of the lower court's opinion. On September 24, 1975, the Court of Appeals ordered Respondents to reply to the first of Petitioners' points in its Motion for Rehearing, which point was founded directly upon the Rutherford Affidavit.

In their Reply to the Motion for Rehearing, Petitioners recognized and cited the long line of uniform holdings of the Courts of Appeal that affidavits outside the record are not before a reviewing court. Because the Court of Appeals called for a reply to Petitioners' argument regarding the Rutherford Affidavit, however, Respondents conditionally tendered to the court the affidavits of James R. Cornelius, Jr., and Edward Janowski, the Government's Contracting Officer on the very contract in question. Petitioners' Motion for Rehearing was denied without opinion on November 12, 1975.

[4] The Bill of Costs in the Court of Appeals demonstrates that this record, excluding the briefs of counsel, consists of 1019 pages of the Record of Proceedings, 1133 pages of the Printed Appendix, and 516 pages of documentary exhibits.

The Sherman Act Question

The opinion of the Court of Appeals does not, as represented by Petitioners, hold that the jury was "justified in finding a violation of Section 1 of the Sherman Act".[5] To the contrary, the court below expressly stated that it was *assuming* for purposes of its opinion that a violation had been shown:

> "If plaintiffs [Petitioners'] theory of the case and version of the evidence were accepted by the jury as they *may* have been, then a Sherman Act violation has been established. *We assume arguendo* that the jury verdict was based on this premise that it was supported by the evidence."[6] (emphasis added)

The court below then ruled that even if a Sherman Act violation is established (step one), an antitrust plaintiff must also establish that the violation proximately caused injury to plaintiff's business (step two) and give some indication of the amount of those damages (step three). The court squarely held, in its opinion by Judge Clark, that it was Petitioners' failure to satisfy the second step — not the third — that led to the result reached.[7] Petitioners utterly misconceive the court's holding when they attempt to challenge the holding below by relying upon those cases supporting the settled principle that assumptions of a lesser evidentiary certainty are justified on the third step of the antitrust plaintiff's journey. Neither the Court of Appeals nor Respondents disagree that lighter proof can satisfy the third step, but the law has never been that the second step can be satisfied by less than the usual standards of proof or by the "assumptions" in which Petitioners would have the courts indulge.

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[5] Petition at 5.

[6] Opinion below, 517 F.2d at 1063, Petitioners' Appendix at 4.

[7] *Id.*, 517 F.2d at 1064, Petitioners' Appendix at 4-5.

The Court of Appeals correctly held that when the alleged violation is accomplished by the granting of a single, conspiratorially low and discriminatory price to one of the plaintiff's competitors, which price is below the usual and prevailing price of the marketplace, the "but for" test of causation is applied, and that this test requires a determination to be made of what the position of the parties would have been had the conspiratory price not been granted. The lower court's opinion amply compiles authorities refuting Petitioners' contention that the test should be to ascertain what the plaintiff's position would have been had it too received the special "discriminatory" price. Respondents will not here reiterate those authorities. Had the court below held that the fact of a discriminatory price must be ignored altogether, it would indeed have been a novel holding of first impression, as is alleged on page 18 of the Petition; but the court did *not* so hold. Nor did the court hold or even intimate that such evidence could not be used in computing the amount of damage once the fact of damage has been shown. To the contrary, the Court of Appeals rightly held that if a wrongful act has occurred when a supplier has given one of several potential customers a discriminatory price, a plaintiff may not claim that it too should have received the improper price.

Applying this correct view of the law, the Court of Appeals' panel of Judges Clark, Goldberg, and Gee reviewed the entire, voluminous record and properly concluded that Petitioners had failed to establish their purely factual contention that they *would have* received the Government contract in question "but for" the alleged conspiracy.[8]

Petitioners' factual argument rests on an assumption that Land-Air, Inc., could not have received the contract

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[8] *Id.* The relevant holding is also reproduced at page 8 of the Petition.

in question. The opinion below amply explains why this assertion is unsupported by the record,[9] and Petitioners' offer of evidence *dehors* the record (the Rutherford Affidavit) is insufficient to establish that Land-Air's position in the bidding should be ignored. First, evidence outside the record is not properly before the Court, but even if the Rutherford Affidavit is considered, it is totally discredited and refuted by Respondents' conditional submission of controverting affidavits.[10] The affidavits appended hereto were conditionally offered by Respondents for consideration by the Court of Appeals in the event the court accepted the Rutherford Affidavit, which was tendered by Petitioners as "new evidence," and are also conditionally offered to this Honorable Court for consideration only in the event that the Rutherford Affidavit is accepted for any purpose.

As the Cornelius Affidavit [Attachment 1] indicates, Respondents have, since the date of the opinion of the Court of Appeals, further investigated the actual facts and circumstances surrounding the award of the contract here in question. As a result, two affidavits have been obtained from Edward Janowski, who was the Contracting Officer on this award. Although the affidavits and attached exhibits are largely self-explanatory, a few points deserve emphasis.

First, the Rutherford Affidavit unequivocally states that Land-Air had effected a withdrawal of its bid. This assertion is demonstrably false. Exhibit B to the first Janowski Affidavit [Attachment 2] evidences the "condition of bidding" that required bid withdrawls to be in writing and to be received before the bids are opened, a requirement of which Land-Air was specifically advised, before it bid, by Exhibit A to the same affidavit. This requirement is also in the record before the Court. *See* Printed Appendix in the Court of Appeals at 429. If Land-Air unilaterally at-

[9] *Id.*

[10] *See* note 3, *supra*.

tempted to withdraw its bid *after* the bid opening, as the Rutherford Affidavit alleges, such an attempt would have been ineffective because the Government's consent would have been required. It is inconceivable that any businessman who has committed his company to a contract obligation to the Government of nearly a million dollars' worth of business would not have taken care to obtain written evidence of the Government's consent when withdrawing from the commitment. Yet, the Rutherford Affidavit contains no documentary support, and the second Janowski Affidavit [Attachment 3] shows that the Government has no indication whatsoever in its files that Land-Air even tried to withdraw its bid, much less that it was permitted to do so. Exhibit C thereto shows that the Government was still corresponding with Land-Air on January 7, 1972, and Exhibit D shows that Land-Air was still being evaluated on December 15, 1971. Thus, no withdrawal occurred, and there is no indication a withdrawal was even attempted.

Second, the Rutherford Affidavit states that the reason no pre-award survey was done on Land-Air was because Land-Air had withdrawn its bid. This is also incorrect. As Exhibits A and B to the second Janowski Affidavit [Attachment 3] demonstrate, the only reason no survey was done was the mistaken misrouting of documents regarding Land-Air. [Because the handwritten portions of Exhibits A and B are difficult to read, typed transcripts are provided herewith as Attachment 4.] When the mistake was discovered, the pre-award survey was not ordered *because* the bids had already been evaluated and "at this point" it "looks like [Land-Air is] not actually low-bidder anyhow" [Ex. B, dated December 17, 1971].

The Robinson-Patman Act Question

Expressly pretermitting consideration of all the other points raised by Respondents in regard to the Robinson-

Patman Act issues,[11] the Court of Appeals founded its opinion on the narrow ground that "Universal and H/R were not competing for the same consumer dollar in their activities . . ."[12] Judge Clark's opinion sets forth complete justification under the law and the record for reaching this factual conclusion, and Respondents will not here expand upon that discussion except to point out that Petitioners' attempted reliance upon the *Bruce's Juices* case[13] was expressly considered and properly rejected by the Court of Appeals.[14]

Rule 19(1)(b) Considerations

Rule 19(1)(b) lists various indicia of when the Court's discretionary power to issue a certiorari should be exercised; none of those reasons are present here. There is no conflict among the circuits. There is no important question of law which has not been decided before by this Court or which should be decided. There is no conflict with the prior decisions of this Court. Lastly, the Court of Appeals did not depart in the least from the accepted and usual course of judicial proceedings, nor has it sanctioned such a departure by a lower court.

Another reason why it would be inappropriate to issue a writ in this case is that the facts are unique and unlikely ever to arise again. By way of example, the Court of Appeals recognized that the goods here in question could be sold only to a single end-user — the military.[15] Thus, the issues here presented could arise again only where a given company is currently purchasing from a certain supplier and is reselling to the military, the Government solicits

[11] Opinion below, 517 F.2d at 1066, Petitioners' Appendix at 6.

[12] *Id.*, 517 F.2d at 1068, Petitioners' Appendix at 9.

[13] American Can Co. v. Bruce's Juices, 187 F.2d 919 (5th Cir. 1951), cert. dismissed, 342 U.S. 875 (1951), modified at 190 F.2d 73 (5th Cir. 1951).

[14] *Id.*, 517 F.2d at 1067, n.17, Petitioners' Appendix at 17-18, n.17.

[15] *Id.*, 517 F.2d at 1061, n.1, Petitioners' Appendix at 2, n.1.

new bids, and both the company and its competitors obtain price quotations from the same supplier. Moreover, it should not be overlooked that Petitioners' case was founded solely upon an alleged price discrimination, and the Robinson-Patman Act itself is currently being studied by the Executive and the Legislative branches with the possible goal of repealing the Act entirely. Highly placed officials of the Antitrust Division of the Department of Justice are urging repeal of the statute,[16] and both the Congress[17] and the White House[18] have begun hearings to determine whether the Act should continue to exist.

The issues in the present case are unlikely to recur and are too narrow and factual in nature to warrant review by this Court on certiorari. The only real questions turn on the particular facts of this case and are of interest only to the parties to it. In essence, Petitioners ask this Court to repeat the Court of Appeals' review of the lengthy trial record to see if it can find evidence to support Petitioners' factual allegations. This Court has long held that this is not a purpose to be served by the extraordinary writ of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnson*, 268 U.S. 220, 227 (1925). In the instant case, Petitioner raises questions entirely dependent upon the resolution of

[16] *See, e.g.*, 723 A.T.R.R. A-4 (Testimony of Joe Sims, Special Assistant to the Head of the Antitrust Division, calling for abolishment of the Act, July 22, 1975); 723 A.T.R.R. A-20 Testimony of Joe Sims, suggesting that "complete repeal" of the Act would be "appealling," September 30, 1975); and 737 A.T.R.R. A-6 (Address by Jonathan C. Rose, Acting Deputy Assistant Attorney General, Antitrust Division, calling for "outright appeal," November 4, 1975).

[17] Congressional subcommittee hearings are reported at 738 A.T.R.R. A-3 (November 11, 1975), 739 A.T.R.R. A-19 (November 18, 1975), 740 A.T.R.R. A-3 (November 25, 1975), and 743 A.T.R.R. A-21 (December 16, 1975).

[18] Activities and hearings of the White House Domestic Council are reported at 740 A.T.R.R. A-3 (November 25, 1975), 742 A.T.R.R. A-20 (December 9, 1975), and 743 A.T.R.R. A-21 (December 16, 1975).

contested issues of unique fact. The Court of Appeals has already fulfilled the task of conducting that review and has correctly applied the unbroken line of authorities upon which it relied to reach its just result. Certiorari should be denied.

CONCLUSION

For the reasons set forth above, Respondents respectfully pray that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

Original
(Signed) B.J.Bradshaw
.....

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CERTIFICATE OF SERVICE

The undersigned attorney of record for Respondents, a member in good standing of the bar of this Court, hereby certifies pursuant to Rule 33(1) of the Rules of the Supreme Court of the United States, that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari and three copies of the separately bound Appendix thereto have been served upon each party hereto by depositing same in a United States mail box, with first class postage prepaid, correctly addressed to their counsel of record at their post office addresses.

Dated: February 23, 1976.

Original
(Signed) B.J.Bradshaw
.....
BUREN JACKSON BRADSHAW

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APPENDIX TO

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FIDELITY PRINTING COMPANY, HOUSTON

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V.

TEXAS FOUNDRIES, INC., ET AL

THE STATE OF TEXAS §
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, personally appeared James R. Cornelius, Jr., of Lufkin, Texas, who being duly sworn, deposes and says:

I am one of the attorneys of record for the Defendants-Appellants in the above-entitled cause. The facts stated in this affidavit are, within my personal knowledge, true and correct.

When we received instructions from the Clerk to reply to point 1 of Plaintiffs'-Appellees' Motion for Rehearing, which contained the hearsay affidavit asserting that Land-Air, Inc., had withdrawn its bid, Mr. Mark Miller and I went to the Arsenal at Rock Island, Illinois (formerly at Joliet) and contacted the Contracting Officer who signed Contract DAAA-09-72-C-0208, Mr. Edward Janowski. He pulled and in our presence reviewed the Contract file and found that it contained no hint of an effort to withdraw Land-Air's bid, and he made an affidavit to that effect which is attached hereto. He also made an affidavit showing that all bidders were warned that any offer they make may become a binding contract simply by acceptance, and that there are strict regulations regarding withdrawal of bids. This affidavit is also attached.

James R. Cornelius, Jr.

SUBSCRIBED AND SWORN TO BEFORE ME this 7th day of October, 1975.

Notary Public in and for
Harris County, T e x a s.

CHARLOTTE CLARK
Notary Public in and for Harris County, Texas

Attachment 1
1 of 1

THE STATE OF ILLINOIS I
COUNTY OF Rock Island I

BEFORE ME, the undersigned authority, on this day personally appeared EDWARD JANOWSKI, who, being by me first duly sworn, upon his oath states that he is over the age of eighteen years and in no way incapacitated to make this Affidavit, and that the following facts are true and correct:

My name is Edward Janowski. I was a Contracting Officer employed by the United States Army Munitions Command, sometimes referred to as MUCOM. I was formerly stationed at Joliet, Illinois, and am now stationed at Rock Island, Illinois. I was the Contracting Officer who signed the contract on behalf of the United States Government with H/H Products, Inc., known as No. DAAA-09-72-C-0208.

This contract resulted from an advertised solicitation for bids, being No. DAAA-09-72-B-0008 dated October 27, 1971.

The solicitation DAAA-09-72-B-0008 sent to all bidders contained a caution sheet, a true and accurate copy of which is attached hereto, and marked Exhibit "A". It also contained "Solicitation Instructions and Conditions" known as Form 33 A, in two pages, containing 19 numbered paragraphs, and Exhibit "B" which is attached hereto and made a part hereof is an exact copy thereof.

Edward Janowski

SWORN TO AND SUBSCRIBED BEFORE ME by the said Edward Janowski this 3rd day of October, 1975, to certify which witness my hand and seal of office.

Notary Public in and for
Rock Island County, Illinois

Attachment 2
1 of 4

UNITED STATES ARMY
AMMUNITION PROCUREMENT AND SUPPLY AGENCY
JOLIET, ILLINOIS 60436

OFFERORS INFORMATION CHECK LIST

CAUTION! THE OFFER YOU SIGN MAY BECOME A BINDING CONTRACT. PLEASE CHECK THE FOLLOWING IMPORTANT POINTS BEFORE SIGNING YOUR OFFER. THIS CHECK LIST IS FORWARDED FOR YOUR CONVENIENCE AND NEED NOT BE RETURNED TO THE GOVERNMENT WITH YOUR OFFER.

☐ **DELIVERIES:**

CAN YOU FULFILL THE PROMISED SCHEDULES?
HAVE YOU CONSIDERED LEAD TIME FOR ALL RAW MATERIALS AND PURCHASED PARTS?
HAVE YOU READ THE DEFAULT CLAUSE OF THE GENERAL PROVISIONS?

☐ **PRICES:**

HAVE YOU CHECKED YOUR COMPUTATIONS?

☐ **MODIFICATION OR WITHDRAWAL OF OFFER:**

HAVE YOU READ PARAGRAPHS 7 AND 8 OF STANDARD FORM 33-A RELATIVE TO MODIFICATION OR WITHDRAWAL OF OFFERS?

☐ **SPECIFICATIONS:**

DO THE ITEMS OFFERED MEET ALL SPECIFICATIONS AND SPECIFICATION REQUIREMENTS?
HAVE YOU LISTED ANY DIFFERENCES?
DO YOU HAVE THE CURRENT REQUIRED DRAWINGS AND SPECIFICATIONS?

☐ **INSPECTION REQUIREMENTS:**

HAVE YOU PROVIDED FOR NECESSARY TEST EQUIPMENT?
HAVE YOU PLANNED FOR A GOOD INSPECTION SYSTEM?

☐ **PACKAGING:**

HAVE YOU READ THE PRESERVATION, PACKAGING, PACKING AND MARKING SPECIFICATIONS?
HAVE YOU ADEQUATE FACILITIES TO COMPLY WITH PACKAGING SPECIFICATIONS?
HAVE YOU MADE COMMITMENTS TO OBTAIN ADEQUATE FACILITIES?

☐ **POSTAGE:**

HAVE YOU PLACED SUFFICIENT POSTAGE ON THE ENVELOPE CONTAINING YOUR OFFER?
DO YOU REALIZE THAT IT CANNOT BE ACCEPTED IF THERE IS "POSTAGE DUE"?
DO YOU REALIZE THAT OFFERS RECEIVED LATE BECAUSE OF RETURN FOR POSTAGE CANNOT BE CONSIDERED?

☐ **SUBMISSION OF OFFER:**

HAVE YOU SIGNED THE ORIGINAL AND TWO COPIES OF YOUR OFFER?
ARE YOU AWARE THAT THE LABEL ENCLOSED IS TO BE USED FOR READY IDENTIFICATION PURPOSES ON THE ENVELOPE CONTAINING YOUR OFFER?

☐ **NO OFFER:**

IF YOU DO NOT INTEND TO SUBMIT AN OFFER, HAVE YOU FOLLOWED THE INSTRUCTIONS OF PARAGRAPH 6, STANDARD FORM, 33-A?
ARE YOU AWARE THAT THE LABEL ENCLOSED SHOULD NOT BE USED IF A "NO OFFER" IS TO BE SUBMITTED?
DO YOU REALIZE THAT CONSISTENT NON-RESPONSE TO SOLICITATIONS MAY RESULT IN REMOVAL FROM THE AMMUNITION PROCUREMENT AND SUPPLY AGENCY'S MAILING LIST?

SMUAPAP (LL) (REV AUG 67) — A APSA - JOLIET, ILL.

SOLICITATION INSTRUCTIONS AND CONDITIONS

1. DEFINITIONS.
As used herein:
(a) The term "solicitation" means Invitation for Bids (IFB) where the procurement is advertised, and Request for Proposal (RFP) where the procurement is negotiated.
(b) The term "offer" means bid where the procurement is advertised, and proposal where the procurement is negotiated.
(c) For purposes of this solicitation and Block 2 of Standard Form 33, the term "advertised" includes Small Business Restricted Advertising and other types of restricted advertising.

2. PREPARATION OF OFFERS.
(a) Offerors are expected to examine the drawings, specifications, Schedule, and all instructions. Failure to do so will be at the offeror's risk.
(b) Each offeror shall furnish the information required by the solicitation. The offeror shall sign the solicitation and print or type his name on the Schedule and each Continuation Sheet thereof on which he makes an entry. Erasures or other changes must be initialed by the person signing the offer. Offers signed by an agent are to be accompanied by evidence of his authority unless such evidence has been previously furnished to the issuing office.
(c) Unit prices for each unit offered shall be shown and such price shall include packing unless otherwise specified. A total shall be entered in the Amount column of the Schedule for each item offered. In case of discrepancy between a unit price and extended price, the unit price will be presumed to be correct, subject, however, to correction to the same extent and in the same manner as any other mistake.
(d) Offers for supplies or services other than those specified will not be considered unless authorized by the solicitation.
(e) Offeror must state a definite time for delivery of supplies or for performance of services unless otherwise specified in the solicitation.
(f) Time, if stated as a number of days, will include Saturdays, Sundays and holidays.
(g) Code boxes are for Government use only.

3. EXPLANATION TO OFFERORS. Any explanation desired by an offeror regarding the meaning or interpretation of the solicitation, drawings, specifications, etc., must be requested in writing and with sufficient time allowed for a reply to reach offerors before the submission of their offers. Oral explanations or instructions given before the award of the contract will not be binding. Any information given to a prospective offeror concerning a solicitation will be furnished to all prospective offerors as an amendment of the solicitation, if such information is necessary to offerors in submitting offers on the solicitation or if the lack of such information would be prejudicial to uninformed offerors.

4. ACKNOWLEDGMENT OF AMENDMENTS TO SOLICITATIONS. Receipt of an amendment to a solicitation by an offeror must be acknowledged (a) by signing and returning the amendment, (b) on the reverse of Standard Form 33, or (c) by letter or telegram. Such acknowledgment must be received prior to the hour and date specified for receipt of offers.

5. SUBMISSION OF OFFERS.
(a) Offers and modifications thereof shall be enclosed in sealed envelopes and addressed to the office specified in the solicitation. The offeror shall show the hour and date specified in the solicitation for receipt, the solicitation number, and the name and address of the offeror on the face of the envelope.
(b) Telegraphic offers will not be considered unless authorized by the solicitation; however, offers may be modified by telegraphic notice, provided such notice is received prior to the hour and date specified for receipt. (However, see par. 8.)
(c) Samples of items, when required, must be submitted within the time specified, and unless otherwise specified by the Government, at no expense to the Government. If not destroyed by testing, samples will be returned at offeror's request and expense, unless otherwise specified by the solicitation.

6. FAILURE TO SUBMIT OFFER. If no offer is to be submitted, do not return the solicitation unless otherwise specified. A letter or postcard should be sent to the issuing office advising whether future solicitations for the type of supplies or services covered by this solicitation are desired. Failure of the recipient to offer, or to notify the issuing office that future solicitations are desired, may result in removal of the name of such recipient from the mailing list for the type of supplies or services covered by the solicitation.

7. MODIFICATION OR WITHDRAWAL OF OFFERS.
(a) If this solicitation is advertised, offers may be modified or withdrawn by written or telegraphic notice received prior to the exact hour and date specified for receipt of offers. An offer also may be withdrawn in person by an offeror or his authorized representative, provided his identity is made known and he signs a receipt for the offer, but only if the withdrawal is made prior to the exact hour and date set for receipt of offers. (However, see par. 8.)
(b) If this solicitation is negotiated, offers may be modified (subject to par. 8, where applicable) or withdrawn by written or telegraphic notice received at any time prior to award. Offers may be withdrawn in person by an offeror or his authorized representative, provided his identity is made known and he signs a receipt for the offer prior to award.

8. LATE OFFERS AND MODIFICATIONS OR WITHDRAWALS. (This paragraph applies to all advertised solicitations. In the case of Department of Defense negotiated solicitations, it shall also apply to late offers and modifications (other than the normal revisions of offers by selected offerors during the usual conduct of negotiations with such offerors) but not to withdrawals of offers. Unless otherwise provided, this paragraph does not apply to negotiated solicitations issued by civilian agencies.)
(a) Offers and modifications of offers (or withdrawals thereof, if this solicitation is advertised) received at the office designated in the solicitation after the exact hour and date specified for receipt will not be considered unless: (1) they are received before award is made; and either (2) they are sent by registered mail, or by certified mail for which an official dated post office stamp (postmark) on the original Receipt for Certified Mail has been obtained and it is determined by the Government that the late receipt was due solely to delay in the mails for which the offeror was not responsible; or (3) if submitted by mail (or by telegram if authorized) it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; provided, that timely receipt at such installation is established upon examination of an appropriate date or time stamp (if any) of such installation, or of other documentary evidence of receipt (if readily available) within the control of such installation or of the post office serving it. However, a modification of an offer which makes the terms of an otherwise successful offer more favorable to the Government will be considered at any time it is received and may thereafter be accepted.
(b) Offerors using certified mail are cautioned to obtain a Receipt for Certified Mail showing a legible, dated postmark and to retain such receipt against the chance that it will be required as evidence that a late offer was timely mailed.
(c) The time of mailing of late offers submitted by registered or certified mail shall be deemed to be the last minute of the date shown in the postmark on the registered mail receipt or registered mail wrapper or on the Receipt for Certified Mail unless the offeror furnishes evidence from the post office station of mailing which establishes an earlier time. In the case of certified mail, the only acceptable evidence is as follows: (1) where the Receipt for Certified Mail identifies the post office station of mailing, evidence furnished by the offeror which establishes that the business day of that station ended at an earlier time, in which case the time of mailing shall be deemed to be the last minute of the business day of that station; or (2) an entry in ink on the Receipt for Certified Mail showing the time of mailing and the initials of the postal employee receiving the item and making the entry, with appropriate written verification of such entry from the post office station of mailing, in which case the time of mailing shall be the time shown in the entry. If the postmark on the original Receipt for Certified Mail does not show a date, the offer shall not be considered.

9. DISCOUNTS. (a) Notwithstanding the fact that a blank is provided for a ten (10) day discount, prompt payment discounts offered for payment within less than twenty (20) calendar days will not be considered in evaluating offers for award, unless otherwise specified in the solicitation. However, offered discounts of less than 20 days will be taken if payment is made within the discount period, even though not considered in the evaluation of offers.

(b) In connection with any discount offered, time will be computed from date of delivery of the supplies to carrier when delivery and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when delivery and

33-303 NOTE: Unless otherwise specified, this form (SF-33A) is designated as Pages 3 and 4 of this solicitation.

acceptance are at either of those points, or from the date correct invoice or voucher is received in the office specified by the Government, if the latter date is later than date of delivery. Payment is deemed to be made for the purpose of earning the discount on the date of mailing of the Government check.

16. AWARD OF CONTRACT. (a) The contract will be awarded to that responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered.

(b) The Government reserves the right to reject any or all offers and to waive informalities and minor irregularities in offers received.

(c) The Government may accept any item or group of items of any offer, unless the offeror qualifies his offer by specific limitations. UNLESS OTHERWISE PROVIDED IN THE SCHEDULE, OFFERS MAY BE SUBMITTED FOR ANY QUANTITIES LESS THAN THOSE SPECIFIED; AND THE GOVERNMENT RESERVES THE RIGHT TO MAKE AN AWARD ON ANY ITEM FOR A QUANTITY LESS THAN THE QUANTITY OFFERED AT THE UNIT PRICES OFFERED UNLESS THE OFFEROR SPECIFIES OTHERWISE IN HIS OFFER.

(d) A written award (or Acceptance of Offer) mailed (or otherwise furnished) to the successful offeror within the time for acceptance specified in the offer shall be deemed to result in a binding contract without further action by either party.

The following paragraphs (e) through (h) apply only to negotiated solicitations:

(e) The Government may accept within the time specified therein, any offer (or part thereof, as provided in (c) above), whether or not there are negotiations subsequent to its receipt, unless the offer is withdrawn by written notice received by the Government prior to award. If subsequent negotiations are conducted, they shall not constitute a rejection or counter offer on the part of the Government.

(f) The right is reserved to accept other than the lowest offer and to reject any or all offers.

(g) The Government may award a contract, based on initial offers received, without discussion of such offers. Accordingly, each initial offer should be submitted on the most favorable terms from a price and technical standpoint which the offeror can submit to the Government.

(h) Any financial data submitted with any offer hereunder or any representation concerning facilities or financing will not form a part of any resulting contract; provided, however, that if the resulting contract contains a clause providing for price reduction for defective cost or pricing data, the contract price will be subject to reduction if cost or pricing data furnished hereunder is incomplete, inaccurate, or not current.

17. GOVERNMENT-FURNISHED PROPERTY. No material, labor, or facilities will be furnished by the Government unless otherwise provided for in the solicitation.

18. LABOR INFORMATION. General information regarding the requirements of the Walsh-Healey Public Contracts Act (41 U.S.C. 35-45), the Contract Work Hours Standards Act (40 U.S.C. 327-330), and the Service Contract Act of 1965 (41 U.S.C. 351-357) may be obtained from the Department of Labor, Washington, D.C. 20210, or from any regional office of that agency. Requests for information should include the solicitation number, the name and address of the issuing agency, and a description of the supplies or services.

19. SELLER'S INVOICES. Invoices shall be prepared and submitted in quadruplicate (one copy shall be marked "original") unless otherwise specified. Invoices shall contain the following information: Contract and order number (if any), item numbers, description of supplies or services, sizes, quantities, unit prices, and extended totals. Bill of lading number and weight of shipments will be shown for shipments made on Government bills of lading.

20. SMALL BUSINESS CONCERN. A small business concern for the purpose of Government procurement is a concern, including its affiliates, which is independently owned and operated, is not dominant in the field of operation in which it is submitting offers on Government contracts, and can further qualify under the criteria concerning number of employees, average annual receipts, or other criteria, as prescribed by the Small Business Administration. (See Code of Federal Regulations, Title 13, Part 121, as amended, which contains detailed industry definitions and related procedures.)

21. CONTINGENT FEE. If the offeror, by checking the appropriate box provided therefor, has represented that he has employed or retained a company or person (other than a full-time bona fide employee working solely for the offeror) to solicit or secure this contract, or that he has paid or agreed to pay any fee, commission, percentage, or brokerage fee to any company or person contingent upon or resulting from the award of this contract, he shall furnish, in duplicate, a complete Standard Form 119, Contractor's Statement of Contingent or Other Fees. If offeror has previously furnished a completed Standard Form 119 to the office issuing this solicitation, he may accompany his offer with a signed statement (a) indicating when such completed form was previously furnished, (b) identifying by number the previous solicitation or contract, if any, in connection with which such form was submitted, and (c) representing that the statement in such form is applicable to this offer.

22. PARENT COMPANY. A parent company for the purpose of this offer is a company which either owns or controls the activities and basic business policies of the offeror. To own another company means the parent company must own at least a majority (more than 50 percent) of the voting rights in that company. To control another company, such ownership is not required; if another company is able to formulate, determine, or veto basic business policy decisions of the offeror, such other company is considered the parent company of the offeror. This control may be exercised through the use of dominant minority voting rights, use of proxy voting, contractual arrangements, or otherwise.

23. EMPLOYER'S IDENTIFICATION NUMBER. (Applicable only to advertised solicitations.) The offeror shall insert in the applicable space on the offer form, if he has no parent company, his own Employer's Identification Number (E.I. No.) (Federal Social Security Number used on Employer's Quarterly Federal Tax Return, U.S. Treasury Department Form 941), or, if he has a parent company, the Employer's Identification Number of his parent company.

24. CERTIFICATION OF INDEPENDENT PRICE DETERMINATION. (a) This certification on the offer form is not applicable to a foreign offeror submitting an offer for a contract which requires performance or delivery outside the United States, its possessions, and Puerto Rico.

(b) An offer will not be considered for award where (a)(1), (a)(3), or (b) of the certification has been deleted or modified. Where (a)(2) of the certification has been deleted or modified, the offer will not be considered for award unless the offeror furnishes with the offer a signed statement which sets forth in detail the circumstances of the disclosure and the head of the agency, or his designee, determines that such disclosure was not made for the purpose of restricting competition.

25. ORDER OF PRECEDENCE. In the event of an inconsistency between provisions of this solicitation, the inconsistency shall be resolved by giving precedence in the following order: (a) the Schedule; (b) Solicitation Instructions and Conditions; (c) General Provisions; (d) other provisions of the contract, whether incorporated by reference or otherwise; and (e) the specifications.

THE STATE OF ILLINOIS

COUNTY OF Rock Island

BEFORE ME, the undersigned authority, on this day personally appeared EDWARD JANOWSKI, who, being by me first duly sworn, upon his oath states that he is over the age of eighteen years and in no way incapacitated to make this Affidavit, and that the following facts are true and correct:

My name is Edward Janowski. I was a Contracting Officer employed by the United States Army Munitions Command, sometimes referred to as MUCOM. I was formerly stationed at Joliet, Illinois, and am now stationed at Rock Island, Illinois. I was the Contracting Officer who signed the contract on behalf of the United States Government with H/R Products, Inc., known as No. DAAA-09-72-C-0208.

I have searched the file on H/R Products, Inc. on Contract DAAA-09-72-C-0208 and find that it does not contain any written statement, memorandums, letter, telegram, or indication of any kind to the effect that Land-Air, Inc. requested to withdraw its bid.

The attached Exhibits A, B, C and D are true copies of documents found in said file. Exhibit A is a telephone or verbal conversation record dated 7 December 1971. Exhibit B, is a telephone or verbal conversation record dated 17 December 1971. Exhibit C is a letter I wrote Land-Air, Inc. 7 Jan, 1972 informing them that H/R Products received the award. I would not have written this letter if I knew Land-Air, Inc. had withdrawn its bid. Exhibit D is a Price Evaluation Report.

Edward Janowski

SWORN TO AND SUBSCRIBED BEFORE ME by the said Edward Janowski this 1 day of October, 1975, to certify which witness my hand and seal of office.

Notary Public in and for Rock Island County, Illinois

TELEPHONE OR VERBAL CONVERSATION RECORD
For use of this form, see AR 340-15; the proponent agency is The Adjutant General's Office.

DATE: 7 Dec 71

SUBJECT OF CONVERSATION: Pre-Award Surveys

INCOMING CALL

PERSON CALLING	ADDRESS	PHONE NUMBER AND EXTENSION
PERSON CALLED	**OFFICE**	**PHONE NUMBER AND EXTENSION**

OUTGOING CALL

PERSON CALLING	OFFICE	PHONE NUMBER AND EXTENSION
Lt Taylor	PCGC	18:10 a.m. 2534
PERSON CALLED	**ADDRESS**	**PHONE NUMBER AND EXTENSION**
Pre-award monitor	DCASR Dallas	940-1421

SUMMARY OF CONVERSATION

Requested advance work be done on Pre-award for Universal + Land Air. Informed him 1524 was forthcoming and he needed it NLT 20 Dec. 71. He indicated it would be ready.

Later

Called back to inform pre-award monitor that Land-Air had been declared non-responsive. Told him to drop Land-Air pre award.

Exhibit A

DA FORM 1 APR 66 751 REPLACES EDITION OF 1 FEB 58 WHICH WILL BE USED.

TELEPHONE OR VERBAL CONVERSATION RECORD
(AR 340-15)

DATE: 17 Dec 71

SUBJECT OF CONVERSATION: Pre-Award Surv, Land-Air, Inc.

INCOMING CALL

PERSON CALLING	ADDRESS	PHONE NUMBER AND EXTENSION
PERSON CALLED	**OFFICE**	**PHONE NUMBER AND EXTENSION**

OUTGOING CALL

PERSON CALLING	OFFICE	PHONE NUMBER AND EXTENSION
Lt Taylor	PCGC	2534
PERSON CALLED	**ADDRESS**	**PHONE NUMBER AND EXTENSION**
Mr. Turnell, Pre-Award Monitor	DCASR, Dallas, Attn:	940-1421

SUMMARY OF CONVERSATION

Reference request for advance action on Pre-Award for Land-Air, Inc. & recall on dropping action on Land Air having due to non-responsiveness, 7 Dec 71 advice that amendments were acknowledged but inadvertently placed with "no bids received". That they were then responsive but preliminary analysis indicate Land-Air, Inc. would not be the lowest evaluated bidder.

Want the information given to me and get out that "Land-Air, Inc was non-responsive.

Mr. Turnell assured me that no award regarding non-responsiveness of Land-Air would get out by their office. ~~Capt~~ I advised him that we will not institute pre-award action at this point however since preliminary analysis looks like they are not technically responsive, consider...

Exhibit B

DA FORM 1 APR 66 751 REPLACES EDITION OF 1 FEB 58 WHICH WILL BE USED.

AMSMU-PP-PCGC 07 JAN 1972

Land Air, Inc.
5801 E. Rosedale
Ft Worth, Texas 76112

Gentlemen:

Reference is made to your bid submitted in response to Invitation for Bid DAAA09-72-B-0003.

The following information regarding contract award resulting from the above referenced Invitation for Bid is furnished for your information:

a. Number of prospective contractors solicited: 159

b. Number of bids received: 16

c. Bidder receiving award: H/R Products Inc.
Indianapolis, Indiana

d. Item: Lifting Plug, Type G

e. Quantity: 1,984,800

f. Price and Shipping Method: $.476 FOB ORIGIN

Your interest in defense contracting is appreciated.

Sincerely,

EDWARD JANOWSKI
Procuring Contracting Officer

Exhibit C

For use of this form, see AR 340-15; the proponent agency is The Adjutant General's Office.

REFERENCE OR OFFICE SYMBOL	SUBJECT
AMSMU-PP-PCAC	Price Evaluation Report, Plug, Lifting, Type G f/155MM Projectile, IFB DAAA09-72-B-0008 1,984,800 each

TO AMSMU-PP-PCGC FROM AMSMU-PP-PCAC DATE 15 Dec 71 CMT 1
Mr. Fox/ps/2798

1. General Information:

a. This analysis was made in accordance with the provisions of ASPR 2-103(iv). ASPR 1-706, PPM 2-4 in reply to your request dated 6 December 1971.

b. IFB DAAA09-72-B-0008 is a 100% small business set aside procurement of 1,984,800 each Lifting Plugs, Type G for 155MM Projectile. The solicitation provides for an option quantity of 50% of the basic quantity.

c. The solicitation package provides for an alternate A quantity of 1,984,800 units and an alternate B quantity of 992,400. The bid package states that bids may be submitted on alternate A quantity or alternate B quantity or any quantity cited herein individually. The package further indicates that awards will be made to the lowest bidder or bidders. The final criterion is that in the event that two awards are made for the alternate B quantities, the total cost must be lower than the total cost for one award on the alternate A quantity.

d. Shown below are the monthly schedules for both alternate A and alternate B quantities:

Feb 72	250,000	125,000
Mar 72	250,000	125,000
Apr 72	250,000	125,000
May 72	200,000	100,000
Jun 72	200,000	100,000
Jul 72	200,000	100,000
Aug 72	200,000	100,000
Sep 72	200,000	100,000
Oct 72	200,000	100,000
Nov 72	34,800	17,400

e. Our examination was limited to the following four bids which you submitted to us for evaluation. These were the lowest bids submitted and are considered to be the only ones that should be used in calculating the least expensive pattern of awards:

AMS Manufacturing Inc.
H/R Products
Land Air Inc.
Universal Automatic Machine Co.

Exhibit D

FOR OFFICIAL USE ONLY

Protective Markings may be removed upon contract finalization or withdrawal of requirement.

DA FORM 1 FEB 62 2496 REPLACES DD FORM 96, EXISTING SUPPLIES OF WHICH WILL BE ISSUED AND USED UNTIL 1 FEB 63 UNLESS SOONER EXHAUSTED.

AMSMU-PP-PCAC
SUBJECT: Price Evaluation Report, Plug, Lifting, Type G f/155MM, Projectile, IFB DAAA09-72-B-0008, 1,984,800 each

2. Purpose:

The purpose of this analysis is to determine if an award can be made for 1,984,800 each Type G Lifting Plug, by utilizing price analysis techniques.

3. Scope:

a. In accordance with the terms and conditions set forth in IFB DAAA09-72-B-0008, the following criteria was used for our evaluation of the bids received.

(1) Item cost bid

(2) Transportation. (Since destinations are unknown, transportation was not considered as an evaluation factor).

(3) Discount for prompt payment.

(4) Price reduction for waiver of first article sample requirement. (Only Universal Automatic Machine Incorporated offered a price reduction for waiver of first article sample requirement. You informed us that they are eligible for waiver, therefore, we used $.0005 as a reductive evaluation factor).

(5) Option Quantity Evaluation. The solicitation provides for the following methods of option evaluation.

(a) If the Government elects to exercise an option simultaneously with award, bid or proposals will be evaluated for purposes of award on the basis of the total price for the basic quantity and the option quantity exercised with award.

(b) Bids and proposals will be evaluated for purposes of award by adding the total price for all option quantities to the total price for the basic quantity. Evaluation of the options will not obligate the Government to exercise the option or options. Any bid or proposal which is materially unbalanced as to prices for basic and option quantities may be rejected as non responsive.

Exhibit D
2

AMSMU-PP-PCAC
SUBJECT: Price Evaluation Report, Plug, Lifting, Type G f/155MM, Projectile, IFB DAAA09-72-B-0008, 1,984,800 each

(c) We felt that there was an inconsistency in the solicitation package in that it contained two separate clauses for option evaluation. Accordingly we solicited the aid of Mr. John Softcheck, Chief Legal Counsel. We were advised to evaluate the package by three methods. First, by determining the total cost for the least expensive pattern of awards by utilizing basic quantities only. Second, by determining the total cost for the least expensive pattern of awards by utilizing basic quantities and simultaneous option quantities if the simultaneous option quantities were less than the total option quantities. Finally, by determining the total cost for the least expensive pattern of awards by using basic quantities plus total option quantities. Mr. Softcheck is of the opinion that if all three methods lead to the same conclusion in the award pattern then the inconsistency in the package is not pertinent.

(d) You verbally told us that there will be no simultaneous option exercise. Accordingly, in our opinion, this eliminates case two above. Therefore, we addressed our evaluation to cases one and three above.

(e) The results of our evaluation show that in both cases it is less expensive to award the basic quantity of 1,984,800 Type G Lifting Plugs to H/R Products. Accordingly, in this case we have concluded that the inconsistency in the option clauses used in the solicitation package is not pertinent.

(6) Government Furnished Property. (None of the four bidders used in our evaluation indicated in the solicitation package that they would use Government Property that might be in their possession for the performance of this effort. Further, the cognizant Contract Specialist indicated that no additional Government property would be offered. Accordingly, GFP was not used as an evaluating factor).

b. Our evaluation includes the comparison of total evaluated prices and total costs as shown on Exhibits A through D attached. Further, we have shown below a listing of recent procurements for comparative purposes. Finally, we show the bid prices received on this solicitation for comparison purposes.

3 Exhibit D

AMSMI-PP-PCAC
SUBJECT: Price Evaluation Report, Plug, Lifting, Type G f/155MM, Projectile, IFB DAAA09-72-B-0008, 1,984,800 each

Contractor	Contract/ Solicitation	Quantity	Maximum Monthly Rate	Unit Price
Universal Automatic Machine Co.	72-C-0133	732,040	200,000	$.4938
Universal Automatic Machine Co.	70-C-0419	172,100	200,000	.4933
H/R Products	70-C-0344	204,095	204,095	.548
Land Air Inc.	70-C-0446	130,000	130,000	.579
A.M.S. Manufacturing Inc.	72-B-0008	1,984,800	250,000	.518
H/R Products, Inc.	72-B-0008	1,984,800	250,000	.476
Land Air, Inc.	72-B-0008	1,984,800	250,000	.488
Universal Automatic Machine Co.	72-B-0008	1,984,800	250,000	.4928
H/R Products, Inc.	72-B-0008	992,400	125,000	.485
Land Air, Inc.	72-B-0008	992,400	125,000	.488
Universal Automatic Machine Co.	72-B-0008	992,400	125,000	.4928

c. Based on our examination of bid prices received, and historical prices, we consider that competition is adequate.

4. Conclusion:

a. Based on adequate competition, coupled with favorable price comparisons, we recommend that the following firm fixed price award be placed:

Contractor	Item	Quantity	Price	F.O.B.
H/R Products Inc.	Lifting Plug for 155MM, Type G	1,984,800	$.476	Orig Mtr.

b. It is noted that H/R Products offered a discount for prompt payment of 1/2 of 1%.

c. The above recommendation is subject to H/R Products receipt of a favorable pre award survey.

d. Option Quantity

The option price of $.473 is considered acceptable for inclusion in the contract. However, it is suggested that the tests of reasonableness prescribed by ASPR 1-1505 be accomplished prior to the award of option quantities.

Farrell R Fox Jr

4 Incl
Exhibits A through D

FARRELL R. FOX, Jr.
Contract Price Analyst

APPROVED: Michael A. Davies
MICHAEL A. DAVIES
Chief, Contr. Price and Cost Anal Sec.

FOR OFFICIAL USE ONLY

Typed verbatim copy of handwritten portion of Exhibit A

7 Dec. 71

Pre-Award Survey

10:00 a.m.

Jo Taylor	PCGC	2534
Pre-award monitor	DCHSR, Dallas	940-1421

Requested advance work be done on Pre-award for Universal & Land Air. Informed him 1524 was forthcoming and we needed it NLT 20 Dec. 71. He indicated it would be ready.

Later

Called back to inform pre-award monitor that Land-Air had been declared non-responsive. Told him to drop Land-Airs pre award.

Exhibit A

Typed verbatim copy of handwritten portion of Exhibit B

17 Dec. 71

Pre-Award Survey/Land-Air, Inc.

L. Papineau PCGC 2534

Mr. Turner, pre award monitor
Pre-Award Monitor - DCASR, Dallas, 940-1421

Reference request for advance action on Pre-Award Land-Air, Inc. & recall on dropping action on Land-Air Survey due to non-responsiveness, 7 Dec. 71 advise that amendments were acknowledged but inadvertently placed with "no bid replies". That they were then responsive but preliminary analysis indicates Land-Air, Inc. will not be the lowest evaluated bidder.

Want this information given so no word gets out that "Land-Air, Inc. was non-responsive.

Mr. Turner assured me that no award regarding non-responsiveness of Land-Air would get out of their office. Advised him that we will not institute pre-award action at this point however since preliminary analysis looks like they are not actually low bidder anyhow.

Exhibit B

Attachment 4
2 of 2